

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF MARYLAND

3 CASE NO. 14-11952-DER

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5 In the Matter of:

6

7 FIRST MARINER BANCORP,

8

9 Debtors.

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11

12 U.S. Bankruptcy Court

13 101 West Lombard Street

14 Baltimore, Maryland

15

16 April 14, 2014

17 10:02 AM

18

19 B E F O R E :

20 HON. DAVID E. RICE

21 U.S. BANKRUPTCY JUDGE

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25 ECRO - SANDY FRANK

1 HEARING Re (15) Motion for sale of Property under Sections
2 363(b) and (I) an Order (A) Approving Bidding and Auction
3 Procedures with Respect to the Sale of Certain Assets, (B)
4 Approving bidding protections for the stalking horse bidder,
5 (C) Approving procedures related to the assumption and
6 assignment of certain executory contracts and unexpired
7 leases, (D) Approving the form and manner of notices related
8 to the auction and sale, and (E) Scheduling the Sale
9 Hearing, and (II) an Order (A) Approving such sale free and
10 clear of liens, claims, encumbrances and other interests and
11 (B) Granting Related relief, Notice Served on 2/10/14, filed
12 by First Mariner Bancorp.

13
14 HEARING Re (118) Line submitting replacement Exhibit D on
15 behalf of First Mariner Bancorp filed by Lawrence Joseph
16 Yumkas (related document(s)(15) Motion for sale of property
17 under Section 363(b) and Notice of motion filed by Debtor
18 First Mariner Bancorp).

19
20 HEARING Re (162) Objection on behalf of RKJS Bank filed by
21 Richard Wasserman

22
23 HEARING Re (163) Motion to Continue Hearing on April 14,
24 2014, filed by RKJS Bank

25 Transcribed by: Sheila Orms and Sherri Breach

1 A P P E A R A N C E S :

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17 BY: CLAUDIA Z. SPRINGER, ESQ.

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P R O C E E D I N G S

(Call to Court)

THE CLERK: On the 10 o'clock docket, calling the case of First Mariner Bancorp, Case No. 14-11952. Counsel, please identify yourself and the clients for the record.

MR. YUMKAS: Good morning, Your Honor, Lawrence Yumkas, Robert Schmidt, Bradley O'Neill on behalf of the debtor. Also with us today is the debtor's internal CEO, Mr. Mark Keidel.

THE COURT: Good morning.

MR. WASSERMAN: Good morning, Your Honor, Richard Wasserman from Venable LLP, on behalf of RKJS Bank. With me today is our other Venable partners, Christopher Mellott, John Beatty, Michael Schiffer and I also wanted to introduce to the Court, the President of RKJS Bank, Robert Kunich, Jr., Rob Kunich.

THE COURT: Good morning to all of you.

MR. GETTLEMAN: Good morning, Your Honor, Jeffrey Gettleman from Kirkland & Ellis representing the committee.

THE COURT: And good morning to you. Anyone else?

MS. SPRINGER: Good morning, Your Honor, Claudia Springer from Reed Smith representing National Penn Bank. And in the courtroom we have a number of people. Lawrence Able is with me and Paul Jascott from my firm, and Scott Baynor (ph) is President of National Penn Bank. He's in the

1 courtroom as well, as is Mike Hughes, who's the Chief
2 Financial Officer for National Penn Bank.

3 THE COURT: I know that there were motions for
4 admission pro hoc vitae filed --

5 MS. SPRINGER: Yes, Your Honor, Saturday.

6 THE COURT: Yes. I haven't had a chance to review
7 them. I don't know whether the fee's been paid, but for
8 purposes of today's hearing, I'm fine with everyone
9 proceeding as if those motions have been granted.

10 MS. SPRINGER: Thank you, Your Honor, I appreciate
11 that.

12 THE COURT: Anyone else?

13 (No response)

14 THE COURT: Very well. We're here today for a
15 hearing in this case on the proposed sale of assets by the
16 Debtor, First Mariner Bancorp was essentially its most
17 important assets, its stock in First Mariner Bank. Bidding
18 procedures were approved by the Court.

19 I understand from the record that the auction was
20 conducted. I have an objection from RKJS, and a motion to
21 continue. Before I turn the proceedings over to the debtor,
22 Mr. Yumkas, let me say this, for purposes of today's
23 hearing, I would like to make clear that the use of
24 electronic devices by anyone who's in the courtroom and
25 behind the bar, which separates the attorneys from the

1 public is not going to be permitted.

2 If you're using electronic devices out there, you
3 should turn them off. The attorneys who are inside the bar
4 when you are participating in the conduct of the case may
5 use electronic devices consistent with the rules of the
6 Court. But we do not permit any recording or photography,
7 but if you're using electronic devices, cell phones, lap
8 tops or whatever for purposes of conducting the case that's
9 okay.

10 If members of the public who are in the gallery
11 wish to use electronic devices, they can leave the courtroom
12 and do so, so as long as they're doing it elsewhere in the
13 courthouse consistent with the rules of court.

14 Mr. Yumkas.

15 MR. YUMKAS: Thank you, Your Honor, Lawrence
16 Yumkas on behalf of the debtors.

17 Your Honor, as the Court has acknowledged late
18 last night and early this morning, an objection was filed by
19 the stalking horse bidders, which is also accompanied by
20 what can be fairly characterized as a higher offer than that
21 received at the provisional close of the auction on Thursday
22 evening.

23 And given the hour that it arrived, what the
24 debtors would like to do before taking a position is have a
25 chance to meet with both the creditor's committee and then

1 the debtor's own board of directors, in order to get clear
2 direction as to how best to respond.

3 And what we're hoping the Court could consider is
4 postponing this hearing and putting it off until 2 o'clock
5 this afternoon, or at any time this afternoon that would
6 work for the Court's convenience. We just need some time to
7 talk these issues through.

8 THE COURT: I see. Well, let me hear a statement
9 of position from all the other parties in the courtroom who
10 wish to be heard.

11 MR. GETTLEMAN: Good morning, Your Honor, Jeffrey
12 Gettleman on behalf of the committee. I mean the papers
13 that came in last night did come in very late, and we've
14 been trying to catch up, and we managed to talk to at least
15 one member of our committee this morning. But we would also
16 appreciate and support a -- at least a short postponement of
17 the hearing so we can confer with our client and with the
18 other parties.

19 THE COURT: All right.

20 MR. WASSERMAN: Richard Wasserman on behalf of
21 RKJS Bank. We have no objection, Your Honor.

22 THE COURT: All right. What about --

23 MS. SPRINGER: Good morning, Your Honor, Claudia
24 Springer on behalf of National Penn Bank. While we have no
25 objection to a very brief continuance, we understand the

1 logistics here, and that these papers were filed late last
2 night, and I believe very early in the morning hours.

3 We would oppose any further continuance that is to
4 another day of the sale hearing. We're here today to
5 proceed with a sale hearing, and today is the day that we
6 would like to proceed.

7 THE COURT: So you're opposing the request to
8 continue this till 2 o'clock, or are you just -- you're just
9 stressing the idea --

10 MS. SPRINGER: No, we are not --

11 THE COURT: -- that we -- you want to have it
12 resolved today.

13 MS. SPRINGER: Right. And if it can be before 2, we
14 would appreciate that as well. We don't know why it should
15 take four hours, but if 2 o'clock is the designated time,
16 then we will be here at 2.

17 THE COURT: All right. I see. Mr. Yumkas. So
18 what is it to be accomplished? I recognize that the papers
19 were filed at 1:45 this morning, but I was up at 6 o'clock,
20 I read them. And obviously there's two sides to every
21 story, but reading what RKJS says, it doesn't seem to me
22 that what they're saying is a surprise to the debtor this
23 morning.

24 So, I mean, why -- what's to be accomplished by
25 this postponement if it's at 2 o'clock or some other time

1 today?

2 MR. YUMKAS: Well, Your Honor, the -- there is an
3 offer contained in the objection, and the papers filed with
4 it that is -- it's an offer that moves the needle in this
5 case, and the board of the debtors think it would be prudent
6 to at least consider it, and of course, weigh in with
7 respect to whether it can be considered, given the auction
8 procedures.

9 THE COURT: All right. Does anybody else wish to
10 be heard on the issue of this request for a short
11 postponement?

12 (No response)

13 THE COURT: I'm going to take a short recess.

14 THE CLERK: All rise.

15 (Recessed at 10:10 a.m.; reconvened at 10:12 a.m.)

16 (Call to Court)

17 THE COURT: Through the recess, I considered the
18 request for a short continuance of this hearing, and I think
19 given the development since the auction, I'll use the word
20 concluded without being conclusory, when the bidding
21 stopped, there had been no developments, and the debtor
22 wishes to have an opportunity to consult with everyone and
23 the committee about what to do in light of the current state
24 of play, I think it is appropriate to grant that request.
25 We will continue this hearing until 1:00 p.m. this

1 afternoon.

2 THE CLERK: All rise.

3 (Recessed at 10:12 a.m.; reconvened at 1:03 p.m.)

4 (Call to Court)

5 THE CLERK: On the 1 o'clock docket, calling the
6 case of First Mariner Bancorp, Case No. 14-11952. Counsel,
7 please identify yourselves and your clients for the record.

8 MR. SCHMIDT: Good afternoon, Your Honor. For
9 First Mariner Bancorp, the Debtor, Robert Schmidt from
10 Kramer Levin Naftalis & Frankel, accompanied by my partner
11 Bradley O'Neill and Larry Imkus (ph).

12 THE COURT: Good afternoon.

13 MR. GETTLEMAN: Good morning, Your Honor or
14 afternoon, Your Honor, Jeffrey Gettleman from Kirkland &
15 Ellis representing the committee.

16 THE COURT: Good afternoon to you.

17 MR. WASSERMAN: Good afternoon, Your Honor,
18 Richard Wasserman, Venable LLP, with me is Christopher
19 Mellott, John Beatty and Michael Schiffer is on his way, on
20 behalf of RKJS Bank.

21 THE COURT: Good afternoon to all of you.

22 MS. SPRINGER: Good afternoon, Your Honor, Claudia
23 Springer from Reed Smith with Paul Sascot and Lawrence Able
24 (ph) for National Penn Bank.

25 THE COURT: Good afternoon to you.

1 UNIDENTIFIED: Good afternoon.

2 THE COURT: We're here for a continuation of this
3 hearing. Does the debtor have a report on the status of
4 affairs?

5 MR. SCHMIDT: Thank you, Your Honor, and thank you
6 for the accommodation of the additional time. A lot of
7 activity has occurred over the last couple of hours. I
8 can't say that we've reached closure on anything at this
9 point in time, not for lack of trying on the part of all
10 parties.

11 So I guess the report would be that it would be
12 our intent to go forward with the sale approval hearing. I
13 know there are -- Mr. Wasserman's motion is also on or
14 Venable's motion for the continuance is also on. We can,
15 you know, proceed however Your Honor would like to, just in
16 terms of sequencing.

17 THE COURT: What I'd like to do is hear maybe a
18 ten minute statement of position from each of the parties on
19 the status of the sale, and the approval of the proposed
20 sale, and the request by RKJS that this hearing be
21 continued.

22 UNIDENTIFIED: Who would you like to go first,
23 Your Honor, on --

24 THE COURT: I'd like to hear from the debtors,
25 it's the debtor's motion.

1 MR. SCHMIDT: Thank you, Your Honor. Again, for
2 the record, Robert Schmidt from Kramer Levin.

3 Your Honor, as the Court noted earlier this
4 morning when we first came on the record briefly, on March
5 8th, this Court approved an order approving the bid
6 procedures governing the auction and sale process, and that
7 was at Docket No. 122.

8 After that order was entered, notice of the sale
9 motion and auction procedures was served on all parties, and
10 publication was made in the Baltimore Sun in accordance with
11 the Court's order. In connection therewith, the debtor's
12 investment banker, Sandler O'Neill proceeded to remarket the
13 bank shares by contacting 50 some odd potential strategic
14 buyers, and you know, a variety of other parties who have
15 expressed interest in these assets over the last several
16 months if not years.

17 The one bank -- the one party that showed up that
18 expressed the strong interest and conducted extensive due
19 diligence as National Cam Bancshares. They signed a NDA,
20 they started diligence, and the good news is that on the
21 March 7th bid deadline, they submitted a bid which was
22 accompanied by a proposed merger agreement, and a deposit of
23 \$2.9 million, which was the requirement under the bid
24 procedures.

25 At that point, the debtor and its advisors

1 promptly analyzed the bid, and in consultation with the
2 committee, determined that it was a qualified bid under the
3 bid procedures. We also with Sandler O'Neill and the
4 company conducted reverse due diligence on National Penn to
5 ensure that, you know, we felt that they would be able to
6 close the transaction in a timely manner.

7 Prior to our determination that Nat Penn was
8 qualified, we received a fairly detailed letter from counsel
9 for RKJS, it's referenced in their objection, in which they
10 raised a number of questions as to the bid qualifications of
11 Nat Penn. We closely analyzed that letter response. We
12 consulted extensively with the committee, and ultimately
13 concluded that the issues raised in that letter were not
14 meritorious, and we continued to view Nat Penn as a
15 qualified bidder.

16 Pursuant to the auction procedures order on April
17 10th, we held an auction for the debtor's equity interest.
18 That auction was held I guess across the way at the office
19 of Miles Stockbridge. It was a very spirited auction, there
20 were multiple rounds of bidding, and it went well late into
21 the evening. I think we concluded at around 10:30 or
22 thereabouts.

23 As -- we were fortunate in that we had
24 sophisticated and capable bidders represented by experienced
25 bankruptcy and corporate counsel, which certainly made the

1 auction proceeding a little bit more easier to deal with.
2 We were quickly -- relatively quickly harmonize the
3 documents, so that to the greatest extent possible, had
4 bidding on an apples-to-apples basis. Although when we get
5 into some testimony a little later on in this, Mr. Boyan
6 will describe in much more detail the way in which the
7 bidding was actually conducted.

8 Your Honor, at the conclusion of the auction, the
9 amounts bid in our view were virtually identical. The RKJS
10 bid on a face basis was slightly higher. By the way, the
11 whole total increase from the initial stalking horse bid was
12 I think roughly about 500 percent. The net to First
13 Mariner's estate increased by approximately 11 million,
14 based on a final net bid by National Penn of 13729025.

15 That number, when I say net bid, they obviously
16 had -- from their total bid, had to back out the break-up
17 fee and expense reimbursement, and a potential purchase
18 price adjustment that was contained in their contract.

19 Your Honor, during the course of the auction
20 proceedings that night, we extensively consulted with the
21 creditor's committee. We had a special subcommittee of the
22 board of directors that was involved. We had a chair of
23 that subcommittee was present for the entirety of the
24 auction, and there were -- if you look at the auction
25 transcript, there are many hours of deliberations, you know,

1 pretty much non-stop throughout the day. Unfortunately, we
2 didn't have dinner, so we kept on going.

3 So -- but after those deliberations, the -- you
4 know, the debtor determined that the bid to National Penn
5 was the best bid, primarily because, you know, we read the
6 economic differences as pretty de minimus, but we did feel
7 after extensive conversations with regulatory counsel, with
8 special committee, the creditor's committee and others, that
9 the Nat Penn bid was the better bid because of the certainty
10 of closing. Nat Penn is a large institution that's an
11 incredibly well capitalized institution, and based on our
12 diligence, we had no qualms that they would be able to
13 close.

14 THE COURT: When was any of that concern
15 communicated in the auction? Because I -- remember, all I
16 had was the objection and the transcript, but if that's a
17 concern that was a factor, it seems like it's come
18 completely out of the blue.

19 MR. SCHMIDT: No, I don't think that's correct,
20 Your Honor. There were discussions throughout the auction
21 process with representatives of RKJS. We did have a concern
22 that as the bidding got higher, and truthfully, the bidding
23 went higher than we had a realistic expectation. But
24 because the RKJS bid is what we'll call a club deal, where
25 there are many, many different investors in the group, there

1 was a concern that as the numbers got higher, that the
2 regulatory issues took on -- potential regulatory issues
3 took on more prominence.

4 THE COURT: Wasn't the process, I mean, I don't
5 want to cut you off, but again, all I've done is read what
6 is in the objection. It seems like there was a fairly
7 organized process, a spreadsheet and model had been
8 developed, and in looking at what I can see so far, it seems
9 like the implication of the debtor's process was that if the
10 next bid was made, it was necessarily higher.

11 And so I have a hard time from the record
12 understanding how the debtor concluded that these other
13 factors, which were never discussed on the record, somehow
14 had greater economic value than what was being implied by
15 the process that was being employed.

16 MR. SCHMIDT: Understood, Your Honor. It was --
17 you know, throughout the process, the regulatory overlay was
18 an important feature that was discussed frequently
19 throughout the day and prior to that.

20 It's hard to -- selling a bank is a lot different
21 than selling a manufacturing company or a retailer or
22 different types of business that us bankruptcy practitioners
23 often do. The regulatory overlay, you know, creates a level
24 of uncertainty and a level of subjectivity that, you know,
25 we had to grapple with, which is, you know, why we had

1 experienced regulatory counsel, each of the parties has
2 experienced regulatory counsel who are very actively
3 involved in the deliberative process.

4 THE COURT: Is the debtor contending that RKJS is
5 not capable of closing the deal that it's proposing in its
6 more recent, modified, amplified purchase price?

7 MR. SCHMIDT: No, we're not suggesting that at
8 all, Your Honor. You know, we're suggesting that based on,
9 you know, everything that we know, and all the diligence
10 that we have done on each of the parties, that the National
11 Penn has a higher likelihood of getting approval sooner and
12 in a more timely manner.

13 The fact of the matter is, RKJS --

14 THE COURT: Why does that matter?

15 MR. SCHMIDT: Well, it matters in --

16 THE COURT: RKJS eliminated its downside purchase
17 adjustment -- price adjustment, which was a concern to me
18 frankly because it implied the price could go to zero. If
19 that's been eliminated, then why does it matter whether one
20 or two weeks or a month or whatever --

21 MR. SCHMIDT: Because they have -- because one,
22 just because of the way -- I mean, their initial deal came
23 to be, they don't have a deposit at risk. And two, they
24 have a walkaway right when you get to --

25 UNIDENTIFIED: April 30th.

1 MR. SCHMIDT: April 30th. So if they don't have
2 regulatory on April 30th, they can walk and, you know, we'd
3 be left with nobody. So, you know, the timing is quite
4 critical.

5 The only other comment I had to add is that, and
6 it's in RKJS's objection, a few hours after the conclusion
7 of the auction at about -- I think about 4 a.m. in the
8 morning, they did submit a revised proposal upping the bid
9 by an additional million dollars.

10 We immediately early the next morning had our
11 deliberations amongst our folks, the committee, and we
12 determined that even with that additional million, we still
13 felt that the Nat Penn bid was the better bid.

14 THE COURT: So the debtor is saying to the Court
15 that something about the likelihood of -- not so much the
16 ability to close the loan, but to obtain regulatory approval
17 promptly was a factor, was the factor that decided the
18 auction?

19 MR. SCHMIDT: That was ultimately among the
20 tenable factors, yes, Your Honor.

21 THE COURT: And what's the evidence going to show
22 the Court that would support the debtor's exercise of its
23 judgment on that?

24 MR. SCHMIDT: Sure. In addition, we would propose
25 in addition to the testimony of Mr. Boyan, who will go

1 through more of the auction mechanics and those types of
2 issues so the Court is aware how things were played out,
3 we'll also hear testimony from Mr. Keidel, the interim CEO
4 who will testify as to the deliberative process, the board
5 process, and how we consulted with the committee and came to
6 the ultimate conclusion.

7 THE COURT: So this is all going to be -- I
8 hesitate to use the word off record, so that -- because
9 that's kind of unfair in characterizing what takes place in
10 these sort of proceedings. But there's going to be a lot of
11 testimony about matters that were not discussed on the
12 record of the transcript of the auction, but went on in
13 these discussions that were outside of the bidding room, and
14 during the various breaks when there was consultation and
15 discussion?

16 MR. SCHMIDT: That's correct, Your Honor. For the
17 most part, the only thing that really was on the record was
18 the actual bidding itself, not any of the deliberative
19 process.

20 THE COURT: All right.

21 MR. SCHMIDT: So unless the Court had any further
22 questions, you know, we're prepared to turn to the testimony
23 either by proffer or by live testimony, whichever the Court
24 would prefer.

25 THE COURT: Well, before we turn to the testimony,

1 I thank you for your statement of the position the debtor is
2 taking what the evidence is going to show. But I'm going to
3 take up and make a ruling on the RKJS motion that's asking
4 for this hearing to be postponed, and in effect, we don't
5 begin with your case because they say they need the
6 opportunity to take discovery about why the other bid was
7 selected as best.

8 MR. SCHMIDT: Fair enough, Your Honor. The only
9 -- well, I guess we'll have a chance to respond after Mr.
10 Gettleman presents his argument.

11 THE COURT: Yes, sure.

12 MR. SCHMIDT: Thank you.

13 THE COURT: All right. I'd like to hear next from
14 National Penn.

15 MS. SPRINGER: Good afternoon, Your Honor, Claudia
16 Springer from National Penn Bank. Should I direct my
17 statements only to the motion that's been made for the
18 continuance of the hearing or --

19 THE COURT: You can do -- I asked for oral
20 statement of position, and I indicated --

21 MS. SPRINGER: Sure.

22 THE COURT: -- I'm taking up the motion to
23 postpone, so --

24 MS. SPRINGER: Okay.

25 THE COURT: -- however you want to use your time.

1 MS. SPRINGER: So, Your Honor, thank you. We're
2 here today to hopefully have the motion of the debtor to
3 sell the assets of the estate approved to National Penn
4 Bank. We're prepared to go forward with our final bid that
5 was submitted on Thursday evening, that's why we came here
6 today. You know, we were certainly somewhat surprised by
7 the papers that were filed last night by the other bidder.

8 Having said that, we're aware that they would like
9 to continue this hearing. We're not prepared to have the
10 hearing continued. We're a public company, we have earnings
11 reports that are coming out. There is reason that we need
12 this to be decided today, and that's why we're all here
13 today. And so if this is continued, I don't believe that
14 National Penn would be part of the bidding process.

15 THE COURT: All right. I have no questions. You
16 stated your position, thank you.

17 MS. SPRINGER: Thank you, Your Honor.

18 THE COURT: I'd like to hear from the creditor's
19 committee, what's the committee's -- well, before you begin,
20 let me ask you, I was a little puzzled by the transcript
21 because it did not appear that anyone from the committee
22 attended the bidding session, other than perhaps your
23 financial advisor.

24 MR. GETTLEMAN: And that must be a mistake. Both
25 Mr. Seligman and I were both present during the whole

1 bidding -- the auction process.

2 THE COURT: Good, okay, I'm glad we clarified that
3 then. So what's the committee's position on what the Court
4 should do today both on the proposed sale and the motion
5 from RKJS?

6 MR. GETTLEMAN: So briefly, Your Honor, without
7 rehashing anything that the debtor has said, the committee,
8 first of all, believes that the auction process went off
9 according to its rules, and was concluded according to its
10 rules. I mean, the -- we, as Mr. Schmidt said, we consulted
11 with the debtor throughout the process, and I mean, our view
12 is, just you know, looking at the simple kind of situation,
13 the debtor's counsel outlined some ground rules at the
14 beginning of the hearing, which I'm sure you've seen in the
15 transcript. And the idea was that the bidding would proceed
16 sequentially with each party having a bid, and then after
17 time when the party, the last party said they were done
18 bidding, then that was the end of the auction. And that's
19 basically what happened.

20 And so our view is that the auction followed the
21 rules. So the -- as far as the -- you know, we also
22 consulted with the debtor about the -- this was prior to the
23 auction about the RKJS's concerns about Nat Penn being a
24 qualified bidder, and we also consulted with our regulatory
25 and corporate attorneys, and we came to the same conclusion

1 as the debtor, that the committee believed that Nat Penn's
2 bid was -- or sorry, Nat Penn was a qualified bidder.

3 As far as the outcome of the auction, again, you
4 know, we've considered the bidding carefully ourselves, and
5 also consulted with the debtor. From the committee's
6 perspective, of course, we're most interested in what funds
7 are going to ultimately come into the estate. And if you
8 look at the numbers, just the numbers of the money that's
9 coming into the estate, the Nat Penn bid actually higher by
10 I think our number is like \$561,000.

11 Now, it is true that there were some adjustments
12 made during the bidding process. There were some credits
13 given to RKJS, but those are just credits for purposes of
14 bidding the way we look at it. And so they weren't like
15 money coming into the estate. So from the creditor's
16 committee's perspective, the Nat Penn bid was monetarily
17 economically superior.

18 And then finally, we also discussed with our own
19 regulatory counsel, and basing it on our own experience and
20 other bank situations, regarding the --

21 THE COURT: What was the point in conducting
22 bidding if you off record, as a committee, had concluded
23 that there was some secret aspect of it, that affected the
24 dollar value of the purchase price being made by one of the
25 -- proposed by one of the parties? I don't understand that.

1 MR. GETTLEMAN: Well, I think it was more of a --
2 I think the -- well, first of all, it isn't our decision,
3 it's the debtor's decision.

4 THE COURT: But when you represent the committee,
5 I'm asking you now as the representative of the committee,
6 what is the committee's position today. I'm not interested
7 in justifications, rationalizations for what took place, in
8 terms of what I'm asking you. What does the committee want
9 the Court to do today about the situation as it exists right
10 now at 1:25 p.m. on Monday?

11 MR. GETTLEMAN: Well, that's easy. We want you to
12 approve the sale based on the auction results.

13 THE COURT: So disregard the subsequent much
14 higher offers being made by RKJS?

15 MR. GETTLEMAN: Well, we -- yes, that's correct,
16 Your Honor.

17 THE COURT: Why?

18 MR. GETTLEMAN: Well, again, I mean, I think the
19 -- there's two aspects to this. One is the straight
20 economics of the bid that was approved at the conclusion of
21 the auction. But the other part of it is, though, Your
22 Honor, that -- and this relates to I think the business
23 judgment of the debtor and accepting -- you know, deciding
24 which bid was superior is that, you know, I -- I mean, we
25 have seen, and I've seen myself, you know, regulators in

1 these situations do things that are unexpected. I mean the
2 bank regulators are basically a blank box, they don't tell
3 you what they're thinking or doing.

4 I mean, even in the letter today that -- or sorry,
5 yes, maybe it was late last night, RKJS submitted with their
6 new bid, it said something to the effect that, they had --
7 because of their increased bid, they had to submit a revised
8 application to the regulators. And the regulators, I think
9 what they said was, we hadn't -- they hadn't heard anything
10 from the regulators to indicate that the regulators weren't
11 pleased with it, or something like that. But that's really
12 not the point. I mean, the regulators don't have any
13 obligation to tell RKJS or anybody else anything about their
14 position.

15 THE COURT: Well, why does it -- I mean, why is
16 that really a factor? I mean, the bidding went way higher
17 than anybody expected. The regulators haven't passed on the
18 bid by Nat Penn, have they? So, I mean, yes, it's a factor,
19 but why is that so critical?

20 MR. GETTLEMAN: Well, it's a factor because
21 ultimately, and again, I'm basing this on my own personal
22 experience as well as seeing other, you know, our
23 consultation with our own regulatory counsel is, you know,
24 regulators in a lot of situations, and I'm not saying this
25 is necessarily this situation, but of course, we don't know

1 what the regulators are saying, so we have to go with our
2 own experience to form our judgments. And, you know, the
3 judgment is that the regulators, in our experience, have
4 seemed to favor offers to buy banks like this from other
5 banks or bank holding companies, as opposed to investor
6 groups.

7 Now, that's not true universally, but it does
8 involve to us sitting out, you know, looking in at the
9 regulatory process, to us, it's a risk. And so therefore,
10 we would rather go with the institution that we think has
11 more probability of closing at the end of the day.

12 THE COURT: All right. So you would say -- what
13 are you saying with respect to the motion that RKJS has made
14 to --

15 MR. GETTLEMAN: Well --

16 THE COURT: -- continue the proceeding because
17 they say discovery is needed.

18 MR. GETTLEMAN: I -- so my understanding of the
19 way that the auction procedures read is that Nat Penn's bid
20 is irrevocable until the sale hearing, I think is the way it
21 reads.

22 So if this hearing is continued, I mean, I think
23 and Nat Penn said that they, you know, say that they have to
24 have it decided today, and they're going to withdraw from
25 the process, then you know --

1 THE COURT: Well, they can say what they wish,
2 that doesn't make it so.

3 MR. GETTLEMAN: No, no, no, I'm not saying that
4 they will. But I'm just saying to the extent that Nat Penn
5 intends to, you know, withdraw from the process, the
6 committee would obviously rather see the bird in the hand.

7 THE COURT: What part of the bidding procedures
8 are you referring to?

9 MR. GETTLEMAN: Your Honor, I'm sorry, I do not
10 have that in front of me. I read it this morning. It is
11 Section 6(e) on page 4 at the bottom of the page.

12 THE COURT: All right. I see what that says.

13 MR. GETTLEMAN: I think that's all I have to say
14 unless the Court has further questions.

15 THE COURT: No, thank you.

16 MR. GETTLEMAN: Thank you, Your Honor.

17 THE COURT: Mr. Wasserman. We had the auction,
18 somebody else was determined to be the highest bidder, why
19 should the Court a) upset that; and b) why should we delay
20 these proceedings by a week, which is what I understand you
21 to be asking, given all the concerns that are being raised?

22 MR. WASSERMAN: Thank you, Your Honor. I'll
23 address the motion for the short continuance that we
24 requested in just a moment.

25 I think there are a number of points I want to

1 respond to in the various arguments presented by counsel.
2 It's incredibly indicative of the frustration that we'd
3 faced throughout, and why we think this auction was
4 hopefully tainted the way -- particularly the way it ended,
5 Your Honor, and I'll come back to that in a moment. Because
6 my client was clearly prepared to make a higher bid and was
7 never given the opportunity to do that, I'll come back to
8 that in a moment.

9 I think very telling, Your Honor, in Mr. Schmidt's
10 argument, in talking about the regulatory approval issue
11 that Your Honor was addressing. A big concern -- let me
12 just preface this by saying, until the statements that Your
13 Honor just heard, that we all have heard today in court, we
14 have never been told what the reasons were that the higher
15 bid of RKJS was passed over, and the lower bid of Nat Penn
16 was taken, without giving us an opportunity to come back and
17 increase our bid if it was a result of economics or
18 something that -- we heard from Mr. Schmidt. While the big
19 concern, so we just heard it today finally, was that there
20 was a walk away right at April 30th, that RKJS had in its
21 contract.

22 At the beginning of the auction, and I think this
23 would probably be reflected in the transcript, if I could
24 find a few minutes finding it, there is no question, Your
25 Honor, that in fact, we agreed right at the beginning, may

1 have been our first opening, Your Honor, to add the same
2 extension to May 31st that is contained in the Nat Penn
3 contract.

4 THE COURT: I think that's important. I'm going
5 to take a short recess while you locate that.

6 THE CLERK: All rise. Court is in recess.

7 (Recessed at 1:30 p.m.; reconvened at 1:33 p.m.)

8 (Call to Court)

9 THE COURT: All right. We left off, Mr.
10 Wasserman, you were going to look for that reference to May
11 30th, I think it was.

12 MR. WASSERMAN: Yes, Your Honor. Thank Your Honor
13 for letting me do that.

14 If Your Honor would turn to page 29 of the auction
15 transcript, what place this is in the auction, this is, in
16 fact, the beginning of the auction. This is our first bid.
17 And Mr. Schiffer, Michael Schiffer from Venable was
18 presenting our bid.

19 If you begin on line 22, on page 29, I'll read it
20 for the record, Your Honor. "So four parts to our bid that
21 will be revisions to the current RKJS merger agreement, the
22 first, as has been requested by the debtor, we are willing
23 to extend the deadline for the drop date dead date on being
24 able to terminate the merger agreement in the event that
25 regulatory approval has not been received to May 31."

1 So the language would be much like the language in
2 the Nat Penn agreement, and if you look at their merger
3 agreement, they have similar language, and we indicated we'd
4 do the same, or essentially the same. But May 31 was
5 clearly the date.

6 So that if all other conditions were satisfied,
7 other than regulatory approval, then the April 30 deadline
8 would automatically be extended to May 31. This was an
9 order to equalize the two for bidding purposes, Your Honor,
10 we did this in our first bid on the record.

11 And again, this is just illustrative of what went
12 on through this whole process. Okay.

13 Also a comment from creditor's committee counsel,
14 Your Honor, we heard for the first time here in court today
15 that there was a new factor that went into the determination
16 of which was the best bid, I suppose. Although I guess this
17 would say it was a higher bid. For the first time, the
18 creditor's committee had a completely different
19 interpretation of the bidding, and said that well, they
20 evaluated Nat Penn as the higher bid. Well, that's totally
21 inconsistent with the entire auction.

22 We attach the last bid sheet that was going on
23 throughout the auction after each round, it went through at
24 least ten rounds, I think it shows, we were the higher
25 bidder by our last bid, it was clearly so. And now we hear

1 for the first time something never discussed, never
2 mentioned in the record, or anything like that, oh, they
3 didn't think we were the higher bidder. They didn't tell
4 this.

5 So you can't run an auction based on factors,
6 inconsistent with what the debtor was doing, or at least
7 what the debtor said it was doing. We don't know what they
8 were really doing. That's one of the things I'll come to in
9 a moment. That's why we need discovery, if we have to go
10 forward on this.

11 In any event, this is amazing that now there's a
12 new thing that they thought in their minds that Nat Penn's
13 bid was the higher bid. Just as I say, totally inconsistent
14 with the entire proceeding in the auction itself.

15 Okay. Your Honor, what I'm going to -- would like
16 to do is just make my argument on this motion for the short
17 continuance.

18 THE COURT: That's fine.

19 MR. WASSERMAN: If I might. So, Your Honor, RKJS
20 objects strenuously to what happened at the auction held on
21 April 10. Details are provided in our objection to sale,
22 including our position that the auction should not have been
23 held, and that's the issue of the qualified bid, Your Honor.
24 And under the auction procedures, RKJS was the highest
25 bidder, and therefore was the successful bidder.

1 Your Honor, in our judgment, the auction was a
2 travesty, as we set forth in some detail in our objection,
3 it was seriously flawed and tainted. The premature and
4 totally arbitrary end of the auction was contrary to the
5 auction procedures, and resulted in the debtor's estate not
6 getting the highest and best bid for its assets.

7 The premature end to the auction cut off any
8 further bids, notwithstanding that RKJS was prepared to make
9 a substantially higher bid at the auction after it was
10 announced that the debtor had chosen someone else
11 notwithstanding we had the higher bid.

12 To re-emphasize the point, the debtor cut off the
13 bidding before RKJS was finished bidding, and would not let
14 us bid further. RKJS never said that we were finished
15 bidding. Remember the last thing that happened was Nat Penn
16 said, it had no further bid. We had a bid outstanding,
17 which was the highest bid at the time. No one came back to
18 us.

19 Indeed RKJS had already -- has already, excuse me,
20 Your Honor, there was -- we had more money to bid, this is
21 evidenced by the fact that we've already proposed offers for
22 an additional \$4 million. Yes, an additional \$4 million
23 we're prepared to add to the final number that we had on the
24 table at the auction. And we've communicated this to the
25 debtor, the committee, other parties.

1 We were prepared to present higher bids at the
2 auction. The auction needs to be a fair and transparent
3 process, which it certainly was not. It is undisputed that
4 RKJS had the highest bid at the end of the auction. I'll
5 footnote that now, Your Honor. We heard something new from
6 creditor's committee counsel that we never knew until we
7 walked into this room, notwithstanding this fact, and we
8 still contend, Your Honor, it's still undisputed because if
9 you look at the debtor's own sheets, we were the highest
10 bid.

11 Notwithstanding this fact, debtor's counsel
12 announced without prior warning, and without any explanation
13 whatsoever, that the debtor had made the decision subject to
14 board approval to accept the lower bid of Nat Penn without
15 giving RKJS an opportunity to respond or further increase
16 its bid.

17 Debtor's counsel said the auction was over, and
18 directed the court reporter to cut off the record. RKJS's
19 counsel asked to respond, and was told, no, the auction is
20 over. Debtor's counsel --

21 THE COURT: Mr. Wasserman, I'm sorry, we're going
22 to have to take a short recess.

23 THE CLERK: All rise.

24 (Recessed at 1:40 p.m.; reconvened at 1:55 p.m.)

25 (Call to Court)

1 THE COURT: Mr. Wasserman, I apologize for the
2 interruption, but I think we're ready to resume.

3 MR. WASSERMAN: Thank you, Your Honor.

4 Let me just pick up where we left off. We were
5 talking about, and I really want to paint the picture of
6 what happened at the end of this auction because it was
7 quite appalling.

8 So after a two and a half hour break, debtor's
9 counsel comes back in, announces the result, the preliminary
10 result. Debtor's counsel then says, the auction's over,
11 directed the court reporter to cut off the record. RKJS's
12 counsel requested an opportunity to respond, and was told,
13 no, the auction was over.

14 Debtor's counsel, the debtor, its financial
15 advisors, the committee's counsel and financial advisors,
16 Nat Penn and its advisors all packed their bags and walked
17 out of the auction room. RKJS had no opportunity to try to
18 discuss the auction procedures, or present a higher offer,
19 which would've provided additional value to the debtor's
20 bankruptcy estate.

21 We've heard a little bit from counsel, as to what
22 their -- what the debtor assigned as reasons. Until we
23 heard it today, we had no reason at all given to us as to
24 why the debtor made the decision that it did.

25 We're entitled to know why and explore the

1 reasons, and what went into that decision. For example,
2 were there any understandings not on the record reached with
3 Nat Penn. We have no idea. We're requesting in our motion
4 a short continuance to take discovery because of the
5 importance of the Section 363 sale in this case, the Court
6 should have a full record before it when it makes its
7 decision.

8 We submit that if RKJS is not declared by this
9 Court to be the winning bidder, as we believe is correct
10 under the auction procedures, the auction should be reopened
11 to allow for further bids, so that the estate can maximize
12 the value of its assets.

13 RKJS advised the debtors several hours after the
14 auction ended that it was prepared to increase its already
15 higher bid by an additional \$1 million. That was at 4 in
16 the morning. The auction ended at 10:30.

17 Indeed, last evening, RKJS further upped its offer
18 to the debtor by another \$3 million, to a now total of \$4
19 million, better than what was the highest bid at the
20 auction. That is a premium over 30 percent above the value
21 to the estate of Nat Penn's bid.

22 It is in the best interests of all parties to
23 pursue the auction in this case to a fair conclusion, to
24 achieve the best price for the debtor's assets. RKJS has
25 spent countless hours and millions of dollars in its efforts

1 to save First Mariner Bank as a local Maryland banking
2 institution, serving the people of the State of Maryland,
3 and the City of Baltimore.

4 To see this effort go up in smoke, poof, by a
5 flawed and tainted auction process is not right, it's not
6 fair, it's not in the public interests. We're asking for a
7 short continuance to do needed discovery, so that we can
8 present a full record to this Court. No one will be
9 prejudiced by a brief delay for a week or so.

10 I'll come back to the issue raised by Nat Penn's
11 counsel in just a moment. There are far too many unknowns
12 here, including the reasons for the debtor's decision to
13 select Nat Penn. They need to be explored through
14 discovery, so that this proposed sale to the lower bidder at
15 the auction is not rushed through the court. Due process
16 requires no less.

17 Let me come back to just a couple of points raised
18 by other counsel as to regulatory approval. Your Honor
19 needs to understand that RKJS has been at this process for
20 months. We have communicated regularly with the regulators,
21 debtor's counsel has been on many of the calls, I think
22 there's a weekly call that includes both debtor's counsel,
23 as well as RKJS's counsel.

24 Mr. John Beatty from our office has been leading
25 that initiative, he's regulatory counsel for RKJS. All of

1 the papers that the regulators have requested have been
2 submitted to the regulators.

3 By contrast, as of the time of the auction, Nat
4 Penn hadn't even begun its regulatory approval. So we're
5 there with all of our papers submitted, and they hadn't even
6 begun the process, Your Honor.

7 Your Honor, we also had this question or the issue
8 raised by Nat Penn's counsel that "If this hearing is
9 continued, Nat Penn will not be part of the bidding
10 process."

11 Well, that's pretty indicative of the other party
12 to the contract that is being asked to be approved as to how
13 fickle they are, and what the risk of closing that
14 transaction is going to be. Seems they cited by Mr.
15 Gettleman flies directly in the face of the auction
16 procedures, Section 6(e).

17 So I think that needs to be taken into
18 consideration as well.

19 Finally, Your Honor, let me just conclude, I want
20 to commend to the Court's reading a case cited in our
21 objection, which is the case of In Re Sunland on page 15 of
22 our memo. It's a case decided from the District of New --
23 the Bankruptcy Court for the District of New Mexico, on
24 March 25th of this year, a couple of weeks ago. It's by
25 Bankruptcy Judge David Thuma, I don't know --

1 THE COURT: I have it. I have it.

2 MR. WASSERMAN: You have it, okay.

3 THE COURT: I have a copy here.

4 MR. WASSERMAN: Yeah, I think it's an excellent
5 case. It sets out the circuit court authority for the -- if
6 Your Honor doesn't rule that RKJS is just the winner, which
7 I believe is consistent with the auction procedures, it's
8 addressed in our objection, then this provides the
9 rationale, the support, the underpinnings for reopening the
10 auction in this case.

11 Our bid is over now with the \$4 million over 30
12 percent higher than the other bid. The auction process was
13 flawed, and we submit the auction should be reopened as our
14 alternative relief that we're asking for, Your Honor.

15 Let me pause here and see if the Court has any
16 questions for me. Our main relief is if this is going
17 forward, we do think we're entitled to -- we tried to keep
18 our request very short, to try to expedite discovery, and it
19 obviously requires cooperation of all parties. So we're not
20 trying to delay this and we are trying to get to the bottom
21 of this so the Court can have a full record if the Court
22 hasn't already, you know. If the Court has any questions, I
23 am happy to answer those.

24 THE COURT: Thank you. I -- yes, I do have a
25 question. I take from what you ended with here, that among

1 the positions your client is asserting is the idea that the
2 Court should reopen the bidding. And I suppose on the
3 premise that the process seemed, at the very least to imply,
4 that the last bid that your client made was highest and
5 best. And then for the first time you learned in these
6 events at the very end of the hearing, that someone was
7 declaring that this bid from Nat Penn was actually highest,
8 and therefore, your client never really had a fair
9 opportunity to make a higher and better bid because of these
10 undisclosed factors that --

11 MR. WASSERMAN: And the early termination of the
12 auction.

13 THE COURT: I think there needs to be a very clear
14 record, and I'm assuming from what you're saying that your
15 client is proposing that -- you have other arguments, but if
16 we get to this one, your client is proposing that we reopen
17 the bidding with this enhanced offer that has been made by
18 your client, the one that includes the additional \$4
19 million. Is that -- if that's correct, I'd like to have a
20 very clear record in this proceeding today that your client
21 is contractually bound to whatever agreement its proposing,
22 not ruling that that was timely, legitimate, should be
23 considered by the Court, but there's an indication from your
24 side that a binding -- an offer of a binding contract is
25 being made by RKJS at this higher price. And if the Court's

1 going to take off on any course that the parties are asking
2 for, I want to know what contract it is that RKJS says it's
3 bound to today, because if Nat Penn walks, we want to know
4 that your buyer is here and under contract.

5 MR. WASSERMAN: Okay. Thank you. Let me just
6 consult with my client for just one moment.

7 THE COURT: Let me take a recess so we can make
8 sure that --

9 MR. WASSERMAN: Certainly, Your Honor.

10 THE COURT: -- and I recognize that some of these
11 papers are not in the record, other than as an attachment,
12 but I want to make sure that what you're proposing is clear
13 on the record as to what your client is bound to. Thank
14 you.

15 MR. WASSERMAN: Thank you, Your Honor.

16 THE CLERK: All rise. Court is in recess.

17 (Recessed at 2:05 p.m.; reconvened at 2:10 p.m.)

18 (Call to Court)

19 MR. WASSERMAN: Thank you, Your Honor, Richard
20 Wasserman on behalf of RKJS.

21 Your Honor, attached as Exhibit 5 to our objection
22 is the new proposal that we made last night. We are
23 prepared to state on the record that yes, RKJS will be bound
24 to that proposal. That is the proposal, in fact, it's a
25 marked up merger agreement attached as part of it.

1 THE COURT: Who is in the courtroom today with
2 authority to make that binding commitment on behalf of RKJS?

3 MR. KUNICH: I am, Your Honor.

4 THE COURT: And who are you, sir? Identify
5 yourself.

6 MR. KUNICH: Robert D. Kunich, Jr.

7 THE COURT: And what's your relationship to RKJS?

8 MR. KUNICH: I'm the President.

9 THE COURT: All right. Thank you, sir.

10 Well, I think that clears that up. Anything else?

11 MR. WASSERMAN: Not unless Your Honor has any
12 further questions.

13 THE COURT: No. That answers my question, thank
14 you.

15 MR. WASSERMAN: Thank you.

16 THE COURT: I'll hear from the debtor. I'm going
17 to assume, unless I hear otherwise from National Penn that
18 they stand by their bid, which was the one selected by the
19 debtor at the auction.

20 MS. SPRINGER: Yes, Your Honor, we stand by that
21 today, and we would like to respond to some of the
22 statements made by Mr. Wasserman. So would you like to hear
23 from the debtor first?

24 THE COURT: Yes.

25 MS. SPRINGER: Okay.

1 THE COURT: Well, let's hear what you have to say.
2 I'd rather hear from the debtor last.

3 MS. SPRINGER: Okay. Your Honor, first of all,
4 Mr. Wasserman was wrong that National Penn Bank did not
5 previously file its application with the OCC or discuss this
6 matter with the OCC. They've been doing that for the past
7 several weeks. So that's absolutely incorrect.

8 And let's face it, they're the stalking horse.
9 They had a head start here, but notwithstanding the fact
10 that they've been talking to the OCC for months, or I think
11 he said they've been at it for months, they still don't have
12 their regulatory approval.

13 Secondly, I think it's -- the Court should take
14 notice of the fact that unlike other 363 sales, where there
15 are back-up bidders, there is no back-up bidder in this
16 case. This is an all or nothing proposition. If these
17 folks are wrong and they don't -- and they are deemed to be
18 the successful bidder and they don't get their approvals,
19 there is nothing in this estate for anybody.

20 So that's a very important factor that the Court
21 should weigh in determining who should be the successful
22 bidder here.

23 Thirdly, it seems that Mr. Wasserman wants to pick
24 and choose those auction procedures that he wants
25 implemented or given effect by the Court. The auction

1 procedures clearly state that if the sale hearing, which is
2 a defined term, does not take place, then -- today, then the
3 offer is a revocable offer.

4 The -- I point out to Your Honor in paragraph 10,
5 or Section 10(a), it states that if an auction is held, the
6 sale hearing, which is a defined term, is April 14th, at 10
7 a.m. And then if you go back to the section that Mr.
8 Wasserman pointed out which is Section 6(e), it states, "the
9 bid shall remain binding and irrevocable until the sale
10 hearing."

11 So our reading of those provisions combined is --

12 THE COURT: I appreciate your reading them, thank
13 you for your argument. I've read this. There is no auction
14 conclusion until the Court approves the last bid made as the
15 highest and best bid. And there's no sale hearing until the
16 hearing is concluded. And take whatever position you want
17 about these auction procedures, but that's the way I read
18 them. Until the Court says, that the last bid accepted is,
19 in fact, the highest and best bid, and it approves the sale,
20 and until the sale hearing is concluded, which it hasn't
21 been, whenever it is, that's when the sale hearing is over.

22 So you can make your arguments, but that's the way
23 I read and I interpret the --

24 MS. SPRINGER: Understood, Your Honor.

25 THE COURT: -- bidding procedures.

1 MS. SPRINGER: But we relied upon the sale hearing
2 being today when we made our offer. And when -- and we were
3 prepared for a sale hearing occurring today. And I would
4 question the -- you know, the -- certainly the motives of
5 Mr. Wasserman's client in filing at 1 o'clock this morning a
6 motion for a continuance in this case, when he knew, I'm
7 sure all the while, that that is what they were going to ask
8 for.

9 Why didn't he pick up the phone on Friday or over
10 the weekend and say, I want to continue this hearing for the
11 following reasons. No such courtesies were extended. And
12 yet he stands here and is concerned about the lack of
13 courtesy that he says was shown to he and his client by the
14 debtor and the creditor's committee. That just doesn't fly,
15 it works both ways. Thank you, Your Honor.

16 THE COURT: All right. What does the debtor have
17 to say?

18 MR. SCHMIDT: I'll be brief, Your Honor, just in
19 response to a few of the points raised by Mr. Wasserman.

20 First, Your Honor, I don't want the Court to think
21 we're crazy. The debtor here would love to be able to --

22 THE COURT: Well, first of all, you were mistaken
23 or somebody was mistaken when they told me that this bid by
24 RKJS had a drop dead date of --

25 MR. SCHMIDT: I was going to get to it, Your

1 Honor, and it was my mistake for which I apologize.

2 THE COURT: Well, that's a pretty big mistake,
3 isn't it? I mean --

4 MR. SCHMIDT: Well, Your Honor --

5 THE COURT: -- you suggested to the Court there
6 was a major feature of why this bid was considered not
7 highest and best, didn't you?

8 MR. SCHMIDT: Well, it really goes to the
9 certainty of closing and not just the timing. The
10 concern --

11 THE COURT: But that's offered up as essentially
12 the reason why this auction is decided one way or the other.

13 MR. SCHMIDT: Well, there are several reasons,
14 Your Honor. What -- you know, while we would've liked the
15 opportunity to take more money as of 1 o'clock this morning,
16 substantially more money, there's still the fact that, you
17 know, we are fiduciaries, we have an obligation to pick the
18 bid that we think has the highest likelihood of closing as
19 the best bid. That was an important consideration, it was
20 an important consideration to the creditor's committee who
21 -- they are the economic party in interest.

22 There's nothing -- the debtor, other than our
23 desire to, you know, have a sale that preserves this bank,
24 you know, we don't really have any skin in the game in terms
25 of the financial outcome. The committee is the sole

1 financial beneficiary here. There's really -- even at the
2 higher levels that were risen to during the bid process,
3 there's no hope that equity will receive anything in this
4 situation.

5 So, you know, that's really the key part of the
6 consideration, the key part of the analysis is certainty of
7 closing. Nat Penn, a very well capitalized national banking
8 institution versus a -- you know, and I don't mean this
9 pejoratively versus a club deal which was RKJS comprised of
10 20 to 25 -- 21 investors.

11 THE COURT: Well, we'll have to see what the
12 evidence is.

13 MR. SCHMIDT: Exactly, Your Honor, and I was going
14 to go there. The -- we don't think there's a need for
15 discovery. The people who have all the answers we're
16 prepared to put on the stand, and they can be, you know,
17 cross-examined and, you know, they'll tell the story of
18 exactly what happened and what went into the process.

19 THE COURT: Are you taking the position that --
20 what is the debtor's position when, if ever it is, that
21 National Penn can walk from its contract, its offer?

22 MR. SCHMIDT: Your Honor, there are a couple of
23 elements of that. There's a DIP element, which as I
24 understand the agreements, that can expire as soon as
25 tomorrow, which would be severely prejudicial to the estate.

1 You know, in terms of their ability to walk, you know, April
2 17th is the date that's in the contract.

3 Now, I appreciate that there are some competing
4 interpretations of the bid procedures and how they work. We
5 agree with Your Honor's analysis on that front in terms of,
6 you know, when the sale hearing concludes or when the sale
7 hearing happens, for lack of a better word.

8 THE COURT: I had one question. I looked at the
9 transcript, and it seems to me what happened here is exactly
10 what was worrying both bidders at the outset of the auction.
11 On page 11, Mr. Tashman asks about what would happen if
12 something like this happened, and Mr. Brady (ph) responds as
13 -- I'm just sort of paraphrasing it here, but -- well, Mr.
14 Tashman says at line 16 on page 11, "I'm assuming that if
15 you were to finish the bidding and my client having made the
16 last bid, that we're not going to subsequently hear that
17 having had more time to think about it, the debtor and the
18 committee has closed the auction and gone with not the last
19 bid." Exactly the circumstance that happened here.

20 And Mr. Brady sort of equivocates on that and
21 says, "We'll take it under advisement." And then Mr.
22 Wasserman raises the same concern on behalf of his client,
23 and there's the same sort of non-responsive, we'll take it
24 under advisement statement made by Mr. Brady. Was there
25 ever anything done to address those concerns? Why would the

1 parties be led to believe that there would be some sort of
2 subsequent advisement or discussion about this issue before
3 the bidding closed?

4 MR. SCHMIDT: Well, Your Honor, in each of those
5 statements by Mr. Brody, he does go on to say that the
6 debtor will deliberate, they'll consult with the committee,
7 which is exactly what we did every step of the way through
8 the proceedings.

9 There was, you know, a constant stream of
10 deliberations after virtually every series of bids. And the
11 regulatory issue was a prominent issue. For RKJS to express
12 surprise that regulatory is all of a sudden an issue I think
13 is a little bit misleading. They've been involved with the
14 regulatory --

15 THE COURT: And why wasn't the party who
16 ostensibly had the high bid under the process that the
17 debtor and the debtor's financial advisors set up, not
18 entitled to make another bid after it was advised for the
19 first time that it's what -- what is -- seems to be
20 characterized in the exhibits that I have as the high bid,
21 was it really the high bid, and therefore, was outbid by
22 some other bid. I mean, I don't understand.

23 MR. SCHMIDT: Well, the logic behind it, Your
24 Honor, was after the deliberations between the debtor's
25 advisors, the committee and its advisors, and the board's

1 special committee, that the fact that where RKJS was -- had
2 evolved to at that point in time after a fairly rapid fire
3 set of bids, you know, how gotten to the break point in
4 terms of where we had a high degree of discomfort with their
5 regulatory -- the potential for regulatory approval on a
6 timely basis.

7 The regulators had been working with one set of
8 numbers, and a bid that started off at a dramatically lower
9 number during the course of that evening, the bids evolved,
10 you know, past where any of us thought they were likely to
11 go. And that's what gave us the pause, that's what led to
12 breaking the action and the deliberations.

13 And the reason that RKJS was not given an
14 opportunity to up the bid, because it really didn't matter,
15 because the higher bid was not going to make the situation
16 any better. Indeed, a higher bid could arguably make the
17 situation worse. So that was the rationale.

18 THE COURT: Explain that one to me again.

19 MR. SCHMIDT: Well, because --

20 THE COURT: Maybe my mind wandered.

21 MR. SCHMIDT: No --

22 THE COURT: But how does the higher bid ever make
23 the situation worse?

24 MR. SCHMIDT: Because we had already reached a
25 point where based on where the auction had evolved to on

1 that evening, that the debtor and its professionals, and the
2 committee and its professionals, regulatory and corporate --

3 THE COURT: So seriously you're suggesting that if
4 they had offered an additional \$4 million, you wouldn't have
5 stopped to think about whether they had the potential to
6 carry through on that, and whether that was enough to
7 outweigh some of your other concerns and to continue the
8 auction or do more due diligence or something? Seriously?

9 MR. SCHMIDT: You know, Your Honor, at that point
10 in time, that was the reason of the decision of the boards
11 of the committee, the committee, and the others involved in
12 the process that more money -- a bigger increase was, you
13 know, reducing the likelihood of regulatory approval.

14 THE COURT: All right.

15 MR. SCHMIDT: Thank you.

16 THE COURT: I understand, thank you. Anyone else
17 wish to be heard? Does the creditor's committee have
18 anything more they wish to say?

19 MR. GETTLEMAN: Your Honor, just only one thing,
20 and that is I understand that we're all trying to, you know,
21 paint a particular picture of what happened at the auction,
22 spin comes to mind, but you know, I guess what I would say
23 is that, you know, from our point of view, and my experience
24 in other auctions, I think the debtor was actually quite
25 careful in trying to not tell all, either bidder what they

1 should do to make, you know, to increase or enhance the
2 possibility that theirs would be chosen. I mean, you know,
3 we as a spectator, and even when we are as a debtor, running
4 an auction, you know, we hear the bids, and the bidding goes
5 on, and at the end of the auction, we use our business
6 judgment to choose who is the right person.

7 And so, you know, I'm not sure that -- you know, I
8 don't think there was anything sinister going on here. And
9 also I don't think that -- I don't think there should have
10 been any explanation about what was either right or wrong
11 with any bid. I mean, the bids are the bids. That's really
12 all I have to say, Your Honor, thank you.

13 MR. SCHMIDT: Your Honor, could I just make one
14 point of clarification on this issue of, you know, why
15 higher is not better?

16 THE COURT: All right.

17 MR. SCHMIDT: The -- as the Court may recall from
18 the bid procedures hearing, there was a high degree of focus
19 on the amount of regulatory capital that RKJS was going to
20 be putting into the new entity, the new bank.

21 The way they were bidding was basically they were
22 step-by-step reducing that amount of regulatory capital that
23 was going on. So arguably if they started at 100 million or
24 90 million and every bid they put in was taking away from
25 the capital that was going into New Co, which was, you know,

1 again really a reason why there was -- the concern that the
2 regulators would not view that favorably.

3 The regulators, quite frankly, I don't think, you
4 know, care very much about how much money comes into the
5 Hold Co bankruptcy estate to pay creditors. They're focused
6 on the capitalization of --

7 THE COURT: But that's not what we're worrying
8 about.

9 MR. SCHMIDT: Well, I understand that, Your Honor,
10 but to the extent that they view the decrease in regulatory
11 capital as material, there's a greater likelihood that
12 they'll either take longer to approve the regulatory
13 applications or not approve them at all. Thank you.

14 THE COURT: All right. Thank you. Mr. Wasserman,
15 I'm going to give you the last word.

16 MR. WASSERMAN: This regulatory point has just not
17 been fairly presented to the Court, and if necessary, I have
18 Mr. Beatty here who can address it if the Court wants to
19 hear by -- from a regulatory lawyer.

20 But you will see in the Exhibit 5 that was
21 submitted last night, the additional proposal, and this was
22 said to -- the debtor knows about this in discussions we've
23 had with them, that the RKJS has already filed with the
24 regulators a business plan and other documents at a lower
25 capitalization, no objection has been raised to that, but no

1 positive response either, and the point that we don't have
2 positive response, they're not going to respond until -- the
3 regulators aren't going to respond until it's known who's
4 going to be the winning bidder. So no one's going to get a
5 sign-off, a final sign-off, until they know you're dealing
6 with the final deal.

7 So that doesn't make sense that there's no sign-
8 off by the regulators. Moreover, we've included in that
9 additional capital availability of at least another \$15
10 million. So if the regulators do need additional capital,
11 it is available in this new proposal. We made sure we
12 covered that, it's committed, you'll see there are signed
13 documents to do that. That's part of our proposal, Your
14 Honor, if necessary, that additional funding is there.

15 THE COURT: Thank you. I've considered the motion
16 to postpone the hearing, and I've considered all the
17 arguments that are being made. And while some of the issues
18 are troubling, I don't believe and I do not find that the
19 motion to continue the hearing should be granted. I'm going
20 to deny it. I believe that we're here under the bidding
21 procedures process the order that the Court entered,
22 everybody knew that we were going to have a hearing today on
23 the proposed sale and the results of the auction. That's
24 going to take whatever course it takes. My guess is it's
25 going to be well beyond the Court's time for hearing that we

1 have available today, and we'll continue from day to day
2 until we reach a conclusion.

3 I think that's exactly the process that the
4 bidding procedures contemplated, and exactly what the
5 parties knew and expected. And that may result in a number
6 of orders, all of which are exactly what any party knew and
7 expected could be the outcome of this hearing.

8 So I'm going to deny the motion to continue
9 today's hearing, and we will start with the debtor's case in
10 support of the proposed sale. I'll take a short recess so
11 that the parties can get organized for that.

12 THE CLERK: All rise. Court is in recess.

13 (Recessed at 2:29 p.m.; reconvened at 2:36 p.m.)

14 (Call to Court)

15 THE COURT: Before we begin, let me just say for
16 the information of the parties, the Court has a regularly
17 scheduled docket later this afternoon, and I would propose
18 that we call those cases at or around 3:20, we should be
19 handle to them in fairly short order, and then resume in
20 this case some time hopefully at or before 4 o'clock.

21 MR. SCHMIDT: Thank you for that guidance, Your
22 Honor. One request that people have asked for me to make,
23 is to get a sense for how late the Court thinks it may go
24 this afternoon in light of the fact that there are a number
25 of folks who are eager to get home for Passover.

1 THE COURT: I am typically sensitive and concerned
2 to the various obligations in religious observances that any
3 party or attorney feels are appropriate to accommodate. But
4 this is a hearing that the parties set up and served up to
5 the Court with their agreement on scheduling for today,
6 knowing exactly what the calendar says. And I have a
7 prospective bidder in court suggesting that it's not bound
8 and it's going to walk away if this matter is not concluded,
9 giving them the benefit of the doubt, as soon as absolutely
10 possible, if not by 12 midnight tonight.

11 So I am intend to proceed with this matter as late
12 as I reasonably can, and continue it from day to day, to
13 hear it at every opportunity that I have, tomorrow, the next
14 day, and the day after where I can take up this case.

15 When we get to 3:20, the Court can take a recess
16 because -- in this hearing, to consider these other cases.
17 Perhaps the parties can discuss in the hallway what they
18 want to do about the scheduling. If the parties are in
19 agreement, it will not be a problem with the Court to try to
20 continue things in a way that accommodates these concerns
21 and this request. But the desire of counsel to get a recess
22 for religious observance reasons, can't prejudice the
23 estate's desire to move forward with the proposed sale. We
24 have a billion dollars, in round numbers, financial
25 institution whose fate is hanging in the balance. A

1 substantial amount of money involved in this case, and so
2 I'm not going to without careful consideration do anything
3 about scheduling until I've had an opportunity to think
4 about it further, in light of whatever the parties might
5 agree to.

6 MR. SCHMIDT: Thank you, Your Honor. We certainly
7 agree with those concerns, which is why Mr. O'Neill and I
8 are here, and Mr. Brody is not. Certainly we're prepared to
9 go as late as it takes, but we appreciate the Court's
10 consideration.

11 THE COURT: All right. Well, it's your case.

12 MR. SCHMIDT: With that, Your Honor, I'll turn the
13 podium over to Mr. O'Neill.

14 THE COURT: All right, fine. Mr. O'Neill.

15 MR. O'NEILL: Good afternoon, Your Honor.

16 THE COURT: Good afternoon.

17 MR. O'NEILL: We are prepared to proceed either by
18 proffer or to put on testimony directly depending on the
19 Court's preference. A proffer obviously would make things
20 move more expeditiously.

21 MR. MELLOTT: Your Honor, Chris Mellott on behalf
22 of RKJS, and it would be our position that we would like to
23 hear the live testimony. We haven't heard any of this
24 before, and so we want to hear these witnesses.

25 THE COURT: Very well, call your witness.

1 MR. O'NEILL: Okay. Your Honor, the debtor calls
2 William Boyan.

3 THE COURT: If you would come forward, sir, you'll
4 need to stand and raise your right hand and be sworn in
5 before you take a seat in the witness box.

6 WILLIAM BOYAN, WITNESS, SWORN

7 THE CLERK: Please be seated. Excuse me, please
8 state your full name and address for the record.

9 THE WITNESS: William L. Boyan, III.

10 THE CLERK: Can you spell your last name?

11 THE WITNESS: B as in boy, o-y-a-n.

12 THE CLERK: Thank you.

13 THE WITNESS: Address, 8400 Comanche Court,
14 Bethesda, Maryland 20817.

15 THE CLERK: Thank you.

16 DIRECT EXAMINATION

17 BY MR. O'NEILL:

18 Q Where do you work, Mr. Boyan?

19 A Sandler O'Neill & Partners.

20 Q And what role does Sandler O'Neill have in this case?

21 A We're the financial advisor for the Debtor, First
22 Mariner Bancorp.

23 Q What is your position at Sandler O'Neill?

24 A Managing director in the investment banking group.

25 Q And you've testified previously in this case; is that

1 right?

2 A Yes, I have.

3 Q And you were qualified as an expert in bank M&A
4 transactions; is that right?

5 A Yes.

6 Q Did you attend the auction last Thursday on April 10th?

7 A I did.

8 Q And what role, if any, did you have in that auction?

9 A I assisted in managing the auction with Josh Brody.

10 Q And broadly speaking, what tasks did you perform in
11 managing the auction?

12 A We developed a short spreadsheet that tracked all the
13 bidding for each of the bids, and tried to assess which bid
14 was highest or best.

15 Q You mentioned the spreadsheet or model; is that right?

16 A Yes.

17 Q Would you explain briefly what that model was intended
18 to do?

19 A To calculate the bids expressed by both parties.

20 MR. O'NEILL: May I approach, Your Honor?

21 THE COURT: Do you have an exhibit?

22 MR. O'NEILL: I have an exhibit.

23 THE COURT: Is it marked?

24 MR. O'NEILL: It is not marked.

25 (Pause)

1 BY MR. O'NEILL:

2 Q Mr. Boyan, you're looking at what's been marked as
3 Debtor's Exhibit 1. What is that?

4 A It's the model that we used to track the bids and
5 calculate the bids.

6 Q And it's the model that Sandler O'Neill prepared to
7 track the bids at the auction --

8 A Correct.

9 MR. O'NEILL: I would offer the document into
10 evidence, Your Honor.

11 MR. MELLOTT: No objection.

12 THE COURT: Debtor's Exhibit 1 is admitted.

13 (Debtor's Exhibit No. 1 received)

14 BY MR. O'NEILL:

15 Q Could you take us through just by way of example one of
16 the bids to explain the nature of the bids and the
17 adjustments that were made to the bids, in order to compare
18 them at the auction?

19 A Sure, certainly. Why don't we start at the left-hand
20 side of the page where it says "original bids." RKJS
21 stalking horse bid was 4 million 775, and from that, they
22 deducted the amount of the estimated March 31st, 2013 Tier 1
23 capital, and that dropped it below 29 million. When RKJS
24 initially made their bid, they said that any bid that they
25 make would be adjusted for the amount of Tier 1 capital that

1 drops below 29 million, which is shown there as \$2,590,773.
2 So the net bid from RKJS was \$2,184,227. So that was the
3 initial bid made by RKJS, the stalking horse bid.

4 Then if you go on to Nat Penn, when we arrived at the
5 auction, Nat Penn made an initial offer of \$8 million, which
6 is on that next line below the yellow box. They also
7 offered up an additional amount of consideration which was a
8 receivable, that was a subsidiary of the bank, that they
9 would then dividend to the holding company and First Mariner
10 Bancorp would get the benefit of that receivable.

11 So that's 8 and a half million in total, but they also
12 followed the same formula that RKJS was following, and they
13 also deducted the estimated amount of the equity that
14 dropped below 29 million, again 2,590,773. So their bid was
15 5,909,227 taking into account that difference in the equity.

16 But as the over bidder had the obligation to pay the
17 break-up fee, which consisted of 250,000 from the holding
18 company, 750,000 from the bank, and then a \$1,750,000 of
19 expenses. So after deducting those economics, the bid
20 really amounted to \$3,159,227.

21 So at that point, they were 975,000 over the \$2,184,227
22 offered by RKJS. Now --

23 Q Did you then make adjustments to some of those numbers?

24 A Yes. We --

25 Q What were those?

1 A The receivable, the tax planning associated with up
2 front National Penn's bid required that the receivable could
3 not be paid off quickly, that it had to get paid off over
4 close. And what we were led to -- in our due diligence
5 found is that over the first six months 450,000 would get
6 paid out of that receivable, but that the remaining amounts
7 would be paid out over the next year and a half, so it'd
8 take two years for that receivable to pay off.

9 So we applied time value of money type of discount to
10 that receivable, and added some administrative costs in that
11 that would be a liquidating trust that we added \$25,000 of
12 additional expenses to manage that fund over the next two
13 years.

14 So the amount of credit that we were giving to that bid
15 was \$453,126.

16 Nat Penn's bid also for tax planning purposes had to
17 contain at least 40 percent stock and the remainder being
18 allocated in cash, and that would also allow them to retain
19 certain tax benefits associated with their bid.

20 So if you continue down the page, the truly cash
21 portion of their bid, outside some of the cash payments that
22 I've already mentioned would be \$295,536 in cash, stock of
23 \$2,363,691.

24 Now, that stock is not (indiscernible) we would've had
25 the -- or I should say, First Mariner would not had the

1 ability to sell immediately after closing. If they did, it
2 would blow the tax treatment again a concern from National
3 Penn.

4 So we were allowed to sell the stock at a minimum would
5 be five days following the closing, the year-end date, which
6 -- in which the month of closing, but it could be up to 35
7 days if, for example, let's say the closing took place on
8 May 1, the year-end date, according to the definitive
9 agreement would be the end of that month, May 31st. And the
10 first date you'd be able to sell that stock would be five
11 days following that, so it'd be June 5th.

12 So the debtor would have to hold that stock for
13 potentially five to 35 days, at which point in time, there'd
14 be market risks in that stock potentially. We came up with
15 some strategies to hedge that risk, found through our
16 diligence that some of those strategies or all of those
17 strategies effectively would've blown the tax treatment, and
18 there needs to be risk on the behalf of the recipient of
19 that stock, in order to -- if the -- if you negate the risk,
20 I should say, then it blows the tax treatment.

21 So in the end, we thought about an appropriate discount
22 for that stock, and we applied initially a 10 percent
23 discount after some negotiations with National Penn, we
24 agreed to reduce that discount to 7 and a half percent. So
25 that's represented there as the \$177,277.

1 So the stock value given to the Nat Penn bid was
2 \$2,186,414 which was a net bid to the estate of First
3 Mariner after all discounts of two million nine hundred and
4 thirty-five dollars and 76 cents -- 76 dollars. That means
5 that the difference after these discounts would be \$750,849.

6 So that is how we calculated the bids. Clearly the
7 minimum over bid was \$150,000, so clearly the Nat Penn
8 initial over bid was in excess of that \$150,000 threshold.
9 So we opened the bid and the auction with RKJS making
10 another bid.

11 Q Just a couple of minor points of clarification for the
12 Court's benefit. To what extent does the stock of Nat Penn
13 publicly traded?

14 A It's publicly traded stock, and fairly liquid with
15 about a billion and a half dollar market cap.

16 Q And you mentioned a few limitations on the estates, if
17 the estate were to accept this currency, limitations on its
18 ability to dispose of that stock. What was the source of
19 those limitations?

20 A It was all tax driven, and clearly part of Nat Penn's
21 bid was associated with the tax benefits that they saw
22 coming out of the transaction. And without those benefits,
23 we weren't sure that they would proceed with their bid or
24 bid as highly as they otherwise might.

25 Q So those limitations were a condition of Nat Penn's

1 bid; is that right?

2 A Yes, they were.

3 Q Okay. How many rounds of bidding were there at the
4 auction last Thursday?

5 A Ten and a half.

6 Q And are each of those rounds of bidding reflected on
7 Exhibit 1?

8 A Yes.

9 Q And what was the value of the final bid submitted by
10 RKJS at the auction last Thursday?

11 A They submitted a bid and they ultimately, RKJS bid and
12 dividend, was willing to dividend that same receivable. So
13 we gave them the same value of that receivable, the
14 \$453,126.

15 So with that and the \$13,225,949 that they bid in cash,
16 amounted to \$13,679,075. Although in the process of the
17 bidding, if you look along the line that says, amount below
18 29 million, you'll see that it's negative 2.6 million
19 essentially until you get to the sixth round, it goes from a
20 negative 2.6 million to a positive 200,000.

21 And as part of their bid, RKJS was willing to do away
22 with that safety net that they were building in for
23 themselves, and eliminating any discount to their bid for
24 the losses associated with the March financials.

25 But they wanted to secure for themselves some sort of

1 premium for providing that benefit to the debtor. Initially
2 we didn't think that made any sense, but we saw a real
3 benefit and trying to protect the purchase price for the
4 debtor, so we were originally offered up \$150,000 credit.
5 They wanted more, so we offered to give them 200,000.

6 And we explained the situation to Nat Penn following
7 the acceptance of that bid, and Nat Penn then considered
8 whether or not they wanted to follow suit and ultimately
9 decided not to.

10 But if you continue to follow across that to the tenth
11 round, you'll see that \$200,000 was still in place in the
12 tenth round, so the value of the net -- the RKJS bid is
13 \$13,879,075.

14 Q And just so the Court's following along, that's all the
15 way over on the right hand -- on the right-hand side in the
16 last column.

17 A Highlighted in yellow.

18 Q Okay. And what was the value of the final submitted by
19 Nat Penn at the auction last Thursday?

20 A Well, if you go under the ninth round bids and go down
21 where it says NBC -- NPDC bid before discounts, you'll see
22 it's \$19,627,834. The stock and cash was \$19,127,834. Then
23 the 500,000 for the receivable, less the \$2.6 million of the
24 potential loss, that left them with \$17 million. Then they
25 had the \$250,000 pay out for the break-up fee, plus the

1 \$750,000 portion of the break-up fee from the bank, the
2 million 750 from the expense reimbursement, left them with a
3 bid of \$14,287,061. That is continuing down then after you
4 look after the discounts all the way down to the green box,
5 you get to \$13,729,075.

6 Q And what is the difference between the value of the two
7 final bids submitted at the auction?

8 A Well, that could be looked at in --

9 Q The dollar value.

10 A Well, there was a \$150,000 difference between the final
11 RKJS bid and the final Nat Penn bid.

12 Q Did there come a time at the auction on Thursday when
13 Nat Penn indicated that it would not bid any further?

14 A No. I mean you're saying right at the auction?

15 Q No.

16 A At the auction concluded, following RKJS's bid, Nat
17 Penn said that they refused to continue, and the -- and at
18 that point in time, we took a recess.

19 Q And after that occurred, did there come a time when the
20 special committee of the board of directors undertook to
21 determine which of the final bids was higher and better?

22 A That evening we did have a discussion about the bids,
23 and frankly, when it got to that dollar amount and the
24 difference being \$150,000, the economics were really not a
25 factor at all in the decision-making process.

1 Q Before we get to that, did you participate in the
2 consideration of the special committee which bid was higher
3 and better?

4 A Yes.

5 Q Who else participated in that?

6 A Mr. Kaddo (ph), Kilpatrick & Townsend, the counsel from
7 their firm, Kramer Levin people, and we had Barry Bondroff
8 (ph) who was a member of the board of directors who was part
9 of the special committee.

10 Q And did you advise the debtor and the special committee
11 of the debtor's board as to which bid you believed was
12 higher and better?

13 A We did not really address higher, but we addressed the
14 regulatory standing of one bidder versus the other, and felt
15 like that was the real difference maker in the bids.

16 Q Would you explain to the Judge what your advice was on
17 that score?

18 A Judge, we realized that the dollars and cents were
19 important, but in the end, if you don't get regulatory
20 approval you can't close the transaction. And we felt like
21 National Penn being a bank holding company, they have
22 substantial capital, they -- we conducted due diligence on
23 their regulatory position, and found that they had very
24 strong footings in the regulatory environment.

25 The CRA, or the Committee of Reinvestment Act rating is

1 -- can be a very troublesome portion of the regulations, and
2 we really dug into that and it's a public record, but found
3 that they had outstanding CRA ratings, which made a big
4 difference in our thought process.

5 So not that RKJS could not get regulatory approval,
6 it's just somewhat more uncertain than the National Penn
7 potential for getting -- achieving regulatory approval.

8 Q What impact, if any, did you advise the special
9 committee that the structure of the RKJS deal as a club deal
10 might have on the likelihood of regulatory approval?

11 A Well, clearly having a bank holding company that is
12 approved by the federal regulators already, has been through
13 numerous examinations by various regulatory bodies, we felt
14 that they had a better chance of getting regulatory approval
15 than an entity that is a new entity that is less known to
16 the regulators.

17 Q And did -- and what was the outcome of the special
18 committee's consideration?

19 A The outcome was they were all unanimously in favor of
20 the National Penn bid. Really mostly based on the fact that
21 they felt like they could get regulatory approval, that it
22 was more certain, not the timing necessarily, but the
23 certainty of the regulatory approval was important to them.

24 Q And were there any reasons why the special committee
25 reached that conclusion?

1 A The creditor's committee played a significant role in
2 the decision-making process, and they also even though are
3 motivated by the dollars and cents, understand the
4 regulatory framework and the considerations and were fully
5 in favor of the Nat Penn bid.

6 Q What was the amount of the increase in value of the
7 estate from the stalking horse bid to the final Nat Penn bid
8 that the special committee was determined highest and best?

9 A Can you repeat the question, please?

10 Q What was the amount of the increase in value to the
11 estate from the initial RKJS stalking horse bid to the Nat
12 Penn bid that -- the final Nat Penn bid that the special
13 committee determined was highest and best?

14 MR. MELLOTT: Objection, Your Honor, I don't
15 believe there's any testimony it was highest.

16 BY MR. O'NEILL:

17 Q The special committee determined -- well.

18 THE COURT: I'll sustain the objection, rephrase
19 your question.

20 Q All right. What was the amount of the increase in
21 value to the estate from the stalking horse bid submitted by
22 RKJS to the Nat Penn bid approved by the special committee
23 following the auction?

24 A It looks like it's about 11 and a half million dollars.

25 MR. O'NEILL: I have nothing else, Your Honor.

1 THE COURT: Cross-examination.

2 CROSS-EXAMINATION

3 BY MR. MELLOTT:

4 Q Thank you, Your Honor. Good afternoon, Mr. Boyan. My
5 name is Chris Mellott. I represent RKJS Bank, I'm an
6 attorney with the Venable Law Firm.

7 You referenced in your direct testimony the special
8 committee members at the auction. Who is on the special
9 committee?

10 A Barry Bondroff, John Brown, Jake -- what's Jake's last
11 name --

12 Q That's all right, if you don't know.

13 THE COURT: Answer the question yourself, sir, you
14 can't --

15 THE WITNESS: All right.

16 THE COURT: -- seek help by anyone in the
17 audience. If you don't know, you don't know.

18 BY MR. MELLOTT:

19 Q And who was there from the special committee?

20 A Just Barry Bondroff, everyone else was patched in by
21 telephone.

22 Q So there was actually a phone hook-up at the auction?

23 A After -- in the evening prior to the decision, prior to
24 the conclusion of the auction, we did hold a conference call
25 with members of the special committee and the chairman of

1 the board to fill them in on the details of the auction and
2 the decision that needed to be made.

3 MR. MELLOTT: If I may, Your Honor, I'm going
4 to --

5 THE COURT: Yes.

6 MR. MELLOTT: -- grab some exhibits
7 (indiscernible).

8 May I approach the witness, Your Honor?

9 THE COURT: You've got an exhibit book? Do you
10 have one for the Court?

11 MR. MELLOTT: I do.

12 THE COURT: All right.

13 MR. MELLOTT: Yes, Your Honor. And, Your Honor,
14 for counsel and for the Court, this is just an exhibit --

15 THE COURT: You need to address the Court from the
16 podium.

17 MR. MELLOTT: Thank you, Your Honor. These are
18 the exhibits in the order and as numbered that were attached
19 to the objection filed yesterday.

20 THE COURT: All right. I understand. So do we
21 have a set of these exhibits for the Court?

22 MR. MELLOTT: Yes, Your Honor.

23 THE COURT: Okay. Thank you.

24 MR. MELLOTT: So the first -- what I believe are
25 the first six exhibits are those that were attached to the

1 objection, and these are other exhibits we may utilize, but
2 I just want to be able to direct the witness, the portions
3 of the exhibit book.

4 BY MR. MELLOTT:

5 Q Let me ask you first of all to direct your attention to
6 Exhibit 1. Do you recognize that to be the transcript from
7 the auction procedure, I mean, the order from the auction
8 procedures that were to be followed for the auction that
9 occurred on August -- April 10th?

10 A It appears to be so.

11 MR. MELLOTT: Your Honor, I would move that into
12 admission.

13 MR. O'NEILL: No objection.

14 THE COURT: So RKJS Exhibit 1 is admitted.

15 (RKJS's Exhibit No. 1 received)

16 BY MR. O'NEILL:

17 Q Then I would ask you to look at Exhibit 2, Mr. Boyan.
18 Do you recognize that to be the transcript that was provided
19 by the court reporter for the auction on April 10th?

20 A It appears to be so.

21 MR. MELLOTT: I would also --

22 THE WITNESS: It's the first time I've seen it,
23 so.

24 MR. MELLOTT: Well, I would move that into
25 evidence, is there any objection?

1 MR. O'NEILL: Your Honor, I object if he hasn't
2 seen it before. We don't have --

3 MR. MELLOTT: You're not going to stipulate to
4 this transcript?

5 MR. O'NEILL: The transcript is --

6 THE COURT: That's enough. I'm going to take a
7 recess, and the witness can examine the document and make a
8 decision on whether he can recognize it or not.

9 UNIDENTIFIED: Your Honor, you don't need to take
10 a recess.

11 THE CLERK: All rise, court is in recess.

12 (Recessed at 3:04 p.m.; reconvened at 3:09 p.m.)

13 (Call to Court)

14 THE COURT: Before we begin, Counsel, let me
15 remind you that counsel are to conduct themselves in a way
16 that involves addressing the Court, and not getting into
17 debates and discussions amongst themselves while the hearing
18 is in process.

19 The one time that I was gaveled by Chief Judge
20 Keir in this court I remember very vividly, it involved
21 exactly the sort of behavior that just took place. I'm sure
22 it won't happen again, I'd ask you to proceed, Mr. Mellott.

23 MR. MELLOTT: Thank you, Your Honor.

24 The RKJS Bank party would move the admission of
25 Exhibits 1, 2, 3, 7, 8, 9, 10 and 11.

1 THE COURT: 1, 2, 3, 7, 8, 9, 10 and 11, did I get
2 that right?

3 MR. MELLOTT: That's correct, Your Honor.

4 THE COURT: We already admitted 1, so it's really
5 2, 3, 7, 8, 9, 10 and 11.

6 MR. O'NEILL: Yeah, 3's in too, but no objection,
7 Your Honor.

8 THE COURT: All right. Then RJ -- I'm sorry, RKJS
9 Exhibits 2, 3, 7, 8, 9, 10 and 11 are admitted and I think
10 we've admitted 1, but if we haven't, 1 is admitted also.

11 (RKJS Exhibit Nos. 2-3, 7-11 received)

12 MR. MELLOTT: Thank you, Your Honor.

13 THE COURT: Next question.

14 BY MR. MELLOTT:

15 Q Mr. Boyan, at the April 10th auction, you discussed
16 with the parties the methodology and process by which the
17 bids would be valued, correct?

18 A Yes.

19 Q And prior to going on the record, there was a
20 discussion in which you and Mr. Josh Brody and
21 representatives of RKJS Bank participated and there was a
22 conversation about what would have economic value, correct?

23 A Yes.

24 Q And that discussion included that there would be
25 economic value for the cash, for the receivable, for

1 consideration of the stock, for the purchase price, and for
2 what the outside date was, correct?

3 A Correct.

4 Q And there was no discussion about having economic value
5 for any of the other items, correct?

6 A I didn't know what any of the items --

7 Q Well, there was no discussion about putting an economic
8 value on regulatory approval, correct?

9 A Anybody who knows anything about bank M&A would know
10 regulatory approval is paramount.

11 Q But you assigned no economic value to regulatory
12 approval in your spreadsheets, did you?

13 A We -- at some point in time we were hoping that one
14 bidder or the other would separate themselves materially
15 from the other that would outweigh that regulatory risk may
16 be involved in the process.

17 Q And when did you convey that to RKJS Bank?

18 A Anyone who knows anything about bank M&A would know
19 that bank regulatory approval is paramount.

20 Q So you didn't convey that to RKJS?

21 A No, it was discussed, they were trying to get to
22 regulatory approval the day prior to the hearing, so that
23 they could have approval going into the hearing.

24 Q Well, certainly they want to get approval as soon as
25 they could, wouldn't they?

1 A They conveyed that to us quite frequently.

2 Q But you set forth the whole process by which you would
3 identify qualified bids based on the economics, correct?

4 A No.

5 Q No?

6 A No. The bidding process was very important to the
7 economics, but it was equally and even more heavily weighted
8 towards the approval of the regulatory process.

9 Q So did you ever say to RKJS Bank, now we don't think
10 you're going to be as likely to be approved, and therefore,
11 you need to factor that in in the amount of your bid?

12 A We had numerous decisions, daily, hourly basis leading
13 up to the hearing or the option. They knew full well that
14 was incredibly an important component, and we can go into
15 all those discussions if you'd like.

16 Q Well, let's just start with what happened at the
17 auction.

18 THE COURT: Could I just -- I know it's -- this is
19 going to go a long time, I think that was an important
20 question. I don't think the witness answered it. And
21 rather than forget it and have to bring it up myself, I'd
22 like you to ask that again and see if you can get the
23 witness to answer your question.

24 BY MR. MELLOTT:

25 Q I want to understand when, when if ever, because I want

1 you to testify when you indicated to and to whom at RKJS
2 Bank that there was going to be a valuation placed on the
3 regulatory approval risk?

4 A We had numerous discussions with both RKJS, leading up
5 to the auction, and they knew it was going to be an
6 important component of the auction process and our decision-
7 making when evaluating bids.

8 Q Well, Mr. --

9 A And that took place specifically in the days leading up
10 to the auction.

11 Q So are you telling me what you said to RKJS is,
12 regulatory approval is also important --

13 A Right.

14 Q Okay. And it's important for both bidders, correct?

15 A Correct.

16 Q But when you went through the list of what you had to
17 value to determine what was the next highest bid to qualify,
18 there was no value put on the regulatory approval, correct?

19 A When we got to the final -- after the tenth round
20 bidding on Exhibit 1, we sat down and evaluated the dollars
21 and cents, and also evaluated the regulatory approval
22 process, in the likelihood that one might receive regulatory
23 approval over the other.

24 Q You evaluated that in your discussions among the bank
25 and the creditor's committee?

1 A Creditor's committee, the special committee of the
2 debtor with counsel, yes, we discussed it extensively.

3 Q And did you come back to RKJS at any point after that
4 tenth bid and say, all right, we think there's a higher
5 regulatory risk with you guys, you need to factor that in in
6 your mind and give us a better bid? Did you ever say that?

7 A Yes.

8 Q You said that?

9 A We --

10 Q No, I said, did you -- listen, please, Mr. Boyan, it'll
11 go a lot faster. Did you after the tenth bid say to RKJS,
12 okay, we have met, it's 7:30, you put your bid on, we have
13 met, and we now are starting to think that we need to also
14 consider the regulatory risk of your getting approved versus
15 Nat Penn getting approved, and we want you to know that we
16 think that means you've got to increase your bid? Did you
17 ever said that?

18 A We repeatedly discussed that fact leading up to the
19 auction. It was a known fact.

20 THE COURT: Mr. Mellott, I think you can stop this
21 line of questioning, the witness' answer is effectively no.

22 MR. MELLOTT: Thank you, Your Honor.

23 BY MR. MELLOTT:

24 Q Mr. Boyan, let me look -- have you look at your
25 spreadsheet which is Debtor's Exhibit 1, and let me start

1 with the amount below 29 million evaluation. Now, the
2 number that was selected by you and by Sandler O'Neill was
3 \$2,590,773, correct?

4 A It was not selected by us. It was calculated with
5 input from the company and shared with the creditor
6 committee, National Penn, and RKJS prior to bids being
7 submitted.

8 Q And that was an estimate, correct?

9 A Correct.

10 Q That was a number that you plugged in because there was
11 not yet final confirmation as to what the amount of equity
12 of or below 29 million was going to be as of March 31,
13 correct?

14 A Correct.

15 Q So that number could've been 2.59, it could've been
16 2.7, it could've been 2.9, didn't know yet, correct?

17 A Correct.

18 Q And so when you got to the sixth round, and RKJS said,
19 okay, we're not going to reduce the purchase price by the
20 amount below 29 million that the final March 31 numbers come
21 out at, the debtor agreed to provide because of that flex in
22 the number, a \$200,000 credit towards the price that RKJS
23 was bidding, correct?

24 A Correct.

25 Q Now, you also did an adjustment for the forgiveness of

1 the receivable, or the basically the bank subsidiary's
2 forgiveness of the receivable if acquired by the bidder, and
3 you reduced that on sort of a present value administrative
4 cost basis, correct?

5 A Correct.

6 Q And you also adjusted the stalk aspect of the Nat Penn
7 bid, and you said, you know, this we can't sell immediately,
8 it might be, as your testimony was, five days, it might be
9 in 35 days, we're going to reduce that initially by 10
10 percent, and then after discussions with Nat Penn you
11 decided to reduce that by 7 and a half percent, correct?

12 A Correct.

13 Q All right. So you put a discount number on what the
14 actual equity is going to be above or below 29 million, you
15 put a discount number on the stock, and you calculated out
16 the specifics of what it was going to be credited in the way
17 of a \$500,000 receivable that's coming back as 500,000 but
18 not until over two years, even though 450,000 were coming
19 back in six months, correct?

20 A Correct.

21 Q And then you go through this process for nine rounds of
22 taking bids. And so in the second round, you've got -- Mr.
23 O'Neill walked you through the first round, let's just go
24 one more round. You've got a number of minimum overbid at
25 the bottom of the first column before the yellow line saying

1 qualified bid of 5,675,849, correct?

2 A Correct.

3 Q Now, that's the number that the debtor is telling RKJS
4 they need to overbid in the next round in order to meet at
5 least the minimum \$150,000 increment, correct?

6 A That is correct.

7 Q Okay. And RKJS comes back and actually bids \$8
8 million, correct?

9 A Correct.

10 Q And after you calculate that all out, you conclude,
11 with all the different reductions because at that point
12 we're still taking out the 2.59 million for the equity, you
13 calculate that all out, and you make a conclusion, and I
14 think you actually stated in the transcript, you make the
15 conclusion, okay, that's going to reflect a bid change of
16 3.6 million in change, and you concluded that in order for
17 Nat Penn then to submit a qualified bid, it needed to go to
18 6,012,353. Do you recall that?

19 A I guess we probably had that plugged into the
20 spreadsheet at the point in time, and it's been replaced by
21 the 12 million that they actually bid, so --

22 Q Well, if you turn to --

23 A -- I assume that that's accurate.

24 Q Okay. And then you get a bid of actually 12 million
25 from Nat Penn which equates to an actual increase to

1 6,815,000 and change, correct, after you do all your
2 adjustments.

3 A Correct.

4 Q So in order for RKJS to make another qualifying bid,
5 they've got to go to 9,102,000 and change, correct?

6 A I understand.

7 Q But you agree?

8 A Yes. I mean, where are we going, are we --

9 Q I'm just trying to --

10 A Okay.

11 Q -- go through the steps.

12 A Okay.

13 Q So you are adjusting and telling RKJS at each of these
14 rounds what they have to bid to qualify for their next bid,
15 correct?

16 A Yes.

17 Q And that went all the way through their bid of
18 13,225,949 in the tenth round that increased their bid the
19 over \$150,000 over Nat Penn's last bid, correct?

20 A Could you repeat the question, please?

21 Q The 13,225,949 that's reflected at the bottom of the
22 ninth round --

23 A Okay.

24 Q -- that is what the debtors are saying RKJS has to bid
25 in the next round --

1 A Correct.

2 Q -- in order to qualify, correct?

3 A Correct.

4 Q And they submit that qualifying bid.

5 A That is accurate.

6 Q Now, you made all these adjustments discounting
7 economically what it would be that you'd have to factor in
8 to equate the stock and equate the receivable, where is --
9 where on this spreadsheet is the factor you've got to put in
10 to equate your bid, RKJS, with Nat Penn's bid for regulatory
11 risk? It's no where on here, is it?

12 A It's not listed because it's not the analysis that we
13 were focused on at that point. This is the numeric
14 analysis, and the other analysis is regulatory analysis.

15 Q Mr. Boyan, you agree that based on the bidding that you
16 conducted, and you basically ran this auction, correct?

17 A The (indiscernible) yes.

18 Q That based on what went back and forth, the highest bid
19 that came in was RKJS', correct?

20 A If you include all the premium and discounts, RKJS is
21 the highest bid. If you eliminate all the premium and
22 discounts, Nat Penn is the highest bid.

23 Q But the process that you set forth for the debtor, and
24 that the debtor proposed to the bidders included all those
25 premiums and discounts, correct?

1 A It did up until that point, and at that point in time,
2 the economics then gave way to the concerns over the
3 regulatory process. As RKJS's bid increased, we became
4 increasingly concerned of the 100 million pie that they had,
5 they were pushing more to the debtor, which is great for the
6 debtor, but it creates even more and more regulatory concern
7 that they'll actually get approval.

8 Now, that's great for the debtor, and would help drive
9 the economics for the debtor, but if they don't get
10 regulatory approval then the debtor gets zero. So we were
11 evaluating that risk throughout the process.

12 Q So the response to the question, which was that these
13 discounts and premiums were applied throughout this auction
14 in the procedure you set up, is it your testimony right now,
15 that that was then changed by you?

16 A No, it was not changed.

17 Q Oh, okay.

18 A It was all part of the process of evaluating the
19 economics.

20 Q So that process continued, and the highest bid with the
21 process you set up was RKJS's, correct?

22 A This bid -- this process is not like any other
23 regulatory or bankruptcy process. I'm sorry that the
24 numbers -- the dollars and cents are the critical part of
25 this. I mean, they are to a degree. And we took it through

1 the auction. We did not know where the auction was going to
2 go. We always hoped that through the process, that someone
3 would differentiate themselves, and each party, Nat Penn and
4 RKJS had ten chances to really differentiate their bid, and
5 we were hoping that we would have something that we could
6 hang our analysis on in totality.

7 You cannot separate the economic from the regulatory
8 stuff. Now, we got to a point, and we (indiscernible) might
9 get to this point, where we have \$150,000 more to RKJS
10 including all the premiums and discounts, and I'll give you
11 that. But in the end \$150,000 was not enough to change the
12 minds of those from the decision-making body to outweigh
13 the -- or outweigh the risk on the regulatory side.

14 Q So when you say there is 150,000, you are agreeing that
15 the highest bid value-wise, as you valued it, the debtor
16 valued it was RKJS's, correct?

17 A Sir, I have explained myself, and you continue to try
18 to put words in my mouth, and I have explained it to you,
19 you can look at it two ways, and if you're not going to
20 accept that, I appreciate that, but don't try to keep
21 putting words in my -- you ask me a question, I'll answer
22 it.

23 Q The process that you've described in which you had a
24 bid that you then turn to Nat Penn to ask for a next bid,
25 you actually calculated the amount that was to be provided

1 by Nat Penn, correct?

2 A We always gave each party the minimum bid that they
3 would have to bid.

4 Q And they indicated not only that they were not going to
5 increase their bid, that they would make no further bids,
6 correct?

7 A That is correct.

8 Q And then you went into a two and a half hour session in
9 which you started to factor in something other than this
10 pricing, correct?

11 A There are significant other factors than just pricing.
12 I'm sorry that you can't accept that.

13 THE COURT: It sounded like a yes or no answer to
14 me, sir.

15 THE WITNESS: Okay.

16 THE COURT: You're not particularly helping the
17 Court understand your testimony if you just don't answer the
18 question.

19 THE WITNESS: I am, but he's trying to imply a
20 meaning --

21 THE COURT: Well, it doesn't sound like an answer
22 to me. Next question.

23 BY MR. MELLOTT:

24 Q During that two and a half hours, you considered
25 factors other than what you had told the parties was going

1 to be the pricing factors for accepting qualified bids,
2 correct?

3 A Yes, we considered the economics and we considered the
4 regulatory.

5 Q Mr. Boyan, the last bid from RKJS according to the
6 transcript came in around 7:19, 7:20, correct?

7 A I suppose so, yes.

8 Q And about a ten minute caucus by Nat Penn, and then
9 they said no further bid about 7:30, correct?

10 A That sounds about right.

11 Q And you confirmed to Mr. Stein of your office by e-mail
12 at about that same time, on the day of the auction, that
13 RKJS was the winning bidder, didn't you?

14 A I don't recall.

15 Q You don't recall sending that e-mail?

16 A No.

17 Q Do you have your Blackberry with you?

18 A I do.

19 Q Would you like to look to see if you sent any e-mails
20 to Mr. Stein on April 10th at around 7:30 p.m.?

21 THE COURT: Are you saying you're prepared to
22 look, sir?

23 THE WITNESS: I don't recall --

24 MR. O'NEILL: I mean, is there a request for
25 production of documents, Your Honor?

1 THE COURT: The witness is on the stand with his
2 Blackberry, apparently there's a belief that an e-mail was
3 sent, and he can check. We're going to take a recess in
4 this case, we need to take our 3 o'clock and 3:30 dockets,
5 and during the recess, the witness can check to see what his
6 records show.

7 Sir, while we're on the recess, you're still on
8 the witness stand, which means you're not allowed to discuss
9 with anyone the substance of your testimony. You may
10 certainly feel free to walk around or go --

11 THE WITNESS: I'll stay right here.

12 THE COURT: Well, if you need to go to the
13 restroom, you can do that too. You can't stay there because
14 we're going to have a hearing in other cases.

15 THE WITNESS: Oh.

16 THE COURT: So you'll need to get down.

17 MR. O'NEILL: Your Honor, I know I can't talk to
18 him about his testimony, may I review the contents of his
19 Blackberry with him?

20 THE COURT: No, let's let the witness answer the
21 question and then we'll see where that goes.

22 THE CLERK: All rise. Court is in recess.

23 (Recessed at 3:30 p.m.; reconvened at 3:55 p.m.)

24 (Call to Court)

25 MR. SCHMIDT: Good afternoon, Your Honor. Robert

1 Schmidt, Kramer Levin. Before proceeding with the witness,
2 I just thought I would like to give the Court a report on --

3 THE COURT: All right.

4 MR. SCHMIDT: -- the discussions on scheduling.

5 I believe the parties are in agreement that we can
6 conclude this evening at 5:30 and pick it up tomorrow at the
7 Court's convenience. The one issue was an issue that we
8 mentioned briefly earlier. My statement and my comments
9 about the DIP being proposed under the Nat Penn deal having
10 a trigger date of tomorrow close of business or their
11 obligation to provide a DIP. And I believe the Nat Penn
12 folks have agreed to push that date out to make it
13 coterminous with other trigger dates in their documents to
14 April 17th. I would just ask Ms. Springer to confirm that
15 on the record.

16 THE COURT: All right. Very well.

17 Ms. Springer.

18 MS. SPRINGER: Two points of clarification, Your
19 Honor. If we are going to conclude before the hearing ends
20 this evening, which is my understanding, I would prefer it
21 if it was earlier than 5:30 so that some of us who are out
22 of towners can possibly get home in time for the holiday,
23 since we're going over to tomorrow anyway.

24 My second request is that, yes, that is correct on
25 the DIP, but it is our understanding that the debtor is in

1 agreement that it is not going to draw down on the DIP until
2 it is known the identity of the successful bidder because
3 the successful bidder will be the party that is providing
4 the DIP, as I understand it.

5 But, you know, as far as we're concerned the 17th
6 in making that -- by the -- that determination will be made
7 by the 17th.

8 THE COURT: All right. Does that address your
9 concerns, Mr. Schmidt?

10 MR. SCHMIDT: Yes, it does, Your Honor. We just
11 didn't want to have an inadvertent trigger if we don't
12 include everything tomorrow or an order is not entered at
13 some point tomorrow. The only other caveat or concern is
14 that with respect to ending earlier than 5:30, I don't know
15 how much longer RKJS is going to have Mr. Boyan on the stand
16 on cross. I just don't think it makes sense to have that
17 carry over.

18 THE COURT: Well, we can't control that. I think
19 we'll go until 5:30 and, you know, we'll do the best we can.
20 Maybe if there's a reason to break earlier, then we can if
21 his testimony is concluded.

22 MR. SCHMIDT: That's fair, Your Honor. Thank you.

23 THE COURT: All right.

24 Now there was a question before this witness, Mr.
25 Mellott, so you can pick up from there.

1 MR. MELLOTT: Thank you, Your Honor.

2 CROSS-EXAMINATION, CONTD.

3 BY MR. MELLOTT:

4 Q I believe I had asked, Mr. Boyan, whether you could
5 check your Blackberry to see whether -- or your iPhone to
6 see whether you had an email to Mr. Stein at around 7:30 on
7 April 10th?

8 A I did check my Blackberry and I had no such
9 communication regarding the outcome of the bidding.

10 Q What about any text messages?

11 A And I checked that as well and I had no text messages
12 with Mr. Stein. I had one email to him on a different
13 subject, never mentioned RKJS or Nat Penn or the bidding. I
14 had a conversation with him late that night at about 11:00
15 after we had all left the auction.

16 Q And at no point during the period from RKJS's last bid
17 until the end of the auction did you convey to Mr. Stein in
18 any form a conclusion that RKJS was the winning bidder?

19 A I did not have any communications with Mr. Stein. He
20 was at the Masters and I was pretty involved with what I was
21 up to, so I -- on the ride home at 10:30 at night I did have
22 a conversation with him.

23 Q Did you have any discussions with any of the attorneys
24 for the debtor or board of the debtor during the break?

25 A You mean today?

1 Q Today.

2 A No. I did not. Someone said hello to me and that was
3 it, but there was no discussions of my testimony or anything
4 else.

5 Q Who was that?

6 A I said hello to Gary Braunstein (ph), but that was it.

7 Q Mr. Boyan, was there any value placed on the bids based
8 on whether First Mariner would remain a local Maryland
9 banking institution?

10 A I think there was some emotions, but it did not factor
11 into the decision-making process one bit.

12 Q Have there been any changes to the merger and
13 acquisition agreement with Nat Penn that was appended to the
14 notice of successful bidder that you're aware of?

15 A The attorneys did work with Nat Penn following that
16 they were deemed to be the successful bidder in preparation
17 for -- I guess that might have been filed Friday night.

18 Q But any changes since that filing that you're aware of
19 other --

20 A No. I didn't --

21 Q -- than what Ms. Springer just announced?

22 A I don't -- right. I don't believe there have been any
23 since that filing, not that I have been made aware of.

24 MR. MELLOTT: One second, Your Honor.

25 Q Have there been any discussions about extending the

1 closing deadline with Nat Penn until June 30th?

2 A There were numerous discussions about that subject and
3 I believe that in the decision of agreement they have agreed
4 under circumstances to extend to June 30.

5 Q Mr. Boyan, at the time that you appeared on March 7th
6 at this court and testified the regarding upcoming auction
7 procedures -- you recall that?

8 A Yes.

9 Q Do you recall stating that there had been a period of
10 time in which Nat Penn had been a potential buyer for First
11 Mariner back in the fall of 2013?

12 A Yes.

13 Q And you recall also stating that you spoke again with
14 Nat Penn and I think it was also FMB after the RKJS term
15 sheet was submitted and signed, correct?

16 A Correct.

17 Q And then I think you also indicated that the Wednesday
18 before the March 7th hearing, Nat Penn had actually come
19 into -- you said the offices. I'm not sure whether that's
20 the bank's offices or Sandler O'Neill's offices and had a
21 three-hour meeting with senior management. Do you remember
22 that?

23 A Yes. It was at the headquarters of First Mariner.

24 Q So when the auction procedures were being proposed, Nat
25 Penn had resurfaced as a potential interested bidder?

1 A That is correct.

2 Q Now Sandler serves as a financial advisor to Nat Penn,
3 correct?

4 A In certain circumstances, yes.

5 Q In fact, you closed the -- Sandler O'Neill closed the
6 deal for Nat Penn to repurchase stock in January of this
7 year, correct?

8 A That's correct.

9 Q I have in the notebook Exhibits 10 and 11. Was there
10 any disclosure of Nat Penn in the application for employment
11 of Sandler & O'Neill?

12 A I don't understand the question.

13 Q Was there any indication to this Court and to the
14 debtors that Sandler O'Neill was also a financial advisor to
15 Nat Penn?

16 A I don't know that there was or was not. I don't know
17 that the question was asked.

18 Q Well, there's an application process in which you apply
19 to the Court and are supposed to list potential conflicts.
20 And I'm asking you -- and you have Exhibit 10 in front of
21 you. Your --

22 A I would have to review it. It's been a while since I
23 looked at that document.

24 Q Well, you're welcome to review it, but I believe you'll
25 find that there's no disclosure of Nat Penn in there.

1 A Okay. At that --

2 THE COURT: Well, let's --

3 THE WITNESS: -- point in time --

4 THE COURT: Hold on a second. Let's direct -- I
5 think you're directing the witness to your Exhibit 11. Is
6 that right?

7 MR. MELLOTT: I believe Exhibit 11 is the order,
8 Your Honor, but maybe I --

9 THE COURT: Well, I have a book in which Exhibit
10 11 is the application and Exhibit 12 is the order.

11 MR. MELLOTT: I'm sorry. Exhibit 11. Thank you,
12 Your Honor.

13 THE COURT: All right. Now the witness -- I think
14 -- you directed him to the exhibit. You -- he's expressed
15 some lack of familiarity with it. Let's let the witness
16 look at it and then let's ask a question.

17 MR. MELLOTT: Thank you, Your Honor.

18 (Pause)

19 THE WITNESS: Okay. I'm ready to proceed with
20 your question. Maybe you can ask a --

21 MR. MELLOTT: All right. Well --

22 THE WITNESS: -- specific question.

23 BY MR. MELLOTT:

24 Q Are you familiar with the doc -- have you --

25 A Yes.

1 Q -- seen this document before?

2 A Yes.

3 Q Is there any indication in this document that Nat Penn
4 was a company that Sandler O'Neill was representing as a
5 financial consultant?

6 A We represent people from time to time in various
7 transactions. I think there was a transaction in January
8 and at that point in time that transaction had concluded.
9 So at that point in time we were not a financial advisor to
10 Nat Penn.

11 Q So it's your position that when this was filed in
12 February you did not consider yourselves to be financial
13 advisors to Nat Penn?

14 A That's correct.

15 Q And when they resurfaced in March, did you indicate to
16 the debtors that you had been the financial advisor for Nat
17 Penn?

18 A I don't know that the subject came up.

19 Q So you don't recall any such conversation?

20 A No.

21 MR. MELLOTT: One second, Your Honor.

22 (Pause)

23 MR. MELLOTT: That's all I have. Thank you, Your
24 Honor.

25 THE COURT: Redirect.

1 MR. O'NEILL: No redirect, Your Honor.

2 THE COURT: I have some questions.

3 THE WITNESS: Okay.

4 THE COURT: So, Mr. Boyan, I'm confused. During
5 what time periods did you act -- you or your firm act as a
6 financial advisor for Nat Penn?

7 THE WITNESS: I believe it was a transaction where
8 they repurchased some stock in -- and I guess it was
9 January. It was not a transaction I was involved with or
10 really had any knowledge of the transaction whatsoever until
11 we got to the point where we were talking about Nat Penn
12 being a viable opportunity here.

13 THE COURT: Did you know about it at that point?

14 THE WITNESS: At that point I suppose, yes, that I
15 knew that we had had some involvement with them. And it was
16 --

17 THE COURT: Was --

18 THE WITNESS: -- nothing more than a stock
19 repurchase.

20 THE COURT: But it was never disclosed?

21 THE WITNESS: Not disclosed nor discussed.

22 THE COURT: And was there some other prior
23 engagement that your firm had on behalf of Nat Penn?

24 THE WITNESS: Not that I'm aware of. There -- we
25 -- Your Honor, we represent numerous financial institutions

1 across the country and from time to time we may have been
2 involved with Nat Penn in the past. But I have never had
3 any involvement with Nat Penn in any transaction up until
4 now.

5 THE COURT: Okay. I understand.

6 I understand your testimony to be -- so I want you
7 to correct me if my understanding is wrong -- that from the
8 time that the auction commenced to the time that you or
9 whoever it was came out at that late hour and declared that
10 the debtor was going to go with Nat Penn, that you never
11 discussed on or off the record with any of the bidders the
12 need for them to try to strengthen or differentiate their
13 bids based upon the fact that ability to close or regulatory
14 approval was becoming an increasingly important factor in
15 the debtor's mind in the auction?

16 THE WITNESS: I would say not from the time that
17 the auction commenced, but as I mentioned, it was -- it was
18 a significant discussion beforehand.

19 THE COURT: Mr. Boyan, you were -- you do this
20 repeatedly and you're asked a direct question. The answer
21 is either yes or no, and I'm taking your answer to be that
22 you confirm that from the time the auction commenced until a
23 winner was declared, if you will, it wasn't discussed.

24 THE WITNESS: That's correct.

25 THE COURT: So no party that was involved in the

1 auction process knew that that was being a factor that was
2 also considered when this financial analysis was being
3 presented that's Debtor's Exhibit 1?

4 MR. O'NEILL: Your Honor, you mean no party
5 meaning no bidder because, obviously --

6 THE COURT: Yes. The bidders.

7 THE WITNESS: Your Honor, I understand your
8 question, but I think you're trying to guide me to an answer
9 that I don't really agree with and that's what I'm trying to
10 convey to everyone is everyone knows this is part of the
11 process. It was discussed extensively prior to the -- so
12 the fact -- it's not like people were going to forget that
13 when they get to the bidding.

14 And so the direct answer to your question is it
15 was not discussed from the time the -- that the auction
16 commenced, but it was discussed extensively prior to that so
17 much so that the -- that RKJS was trying to secure their
18 financial -- their regulatory approval prior to the auction
19 commencing, which we were encouraging them to do so.

20 THE COURT: At the outset of the auction both
21 parties expressed concern that the bidding might stop
22 without -- and I'm sort of characterizing what the
23 transcript says. You're free to look at it if you wish.
24 But that the bidding might stop and something like what we
25 have happened here would happen. And they wanted an

1 opportunity to understand what was causing the decision to
2 be made and a chance to improve their position before the
3 auction was concluded, right?

4 THE WITNESS: That's correct.

5 THE COURT: And both parties inquiries', Mr. Brody
6 responded that the debtor was taking it under advisement?

7 THE WITNESS: That's correct.

8 THE COURT: Was there ever any discussion with any
9 of the parties about what under advisement meant or any kind
10 of response to this concern before the auction was
11 concluded?

12 THE WITNESS: Periodically through the day we did
13 have conversations, particularly with RKJS, about where they
14 really stood financially. We took the numbers of their team
15 aside and said, we really need to know the specifics of your
16 commitments and the pro forma financial ratios because if
17 they don't hit certain ratios they are never going to get
18 regulatory approval. And we talked through that with them
19 and requested that they give us information that would help
20 enhance their bid and their standing in the eyes of the
21 regulators.

22 And as I mentioned earlier, you know, there's two
23 pieces of the pie. They raised a hundred million. If they
24 keep giving more to the holding company, that hurts their
25 chances at the bank level. And we did have communications

1 through the day with counsel and -- involved where those
2 were pretty extensive discussions.

3 THE COURT: And why not disclose at the conclusion
4 what the debtors' evaluation was of the merits of the two
5 bids and invite some opportunity for one party or the other
6 to enhance their bid to address the issue?

7 THE WITNESS: Well, we -- as I mentioned, we were
8 trying to encourage more disclosure through the day from
9 RKJS. And at the end it was our fear that they would try to
10 overextend in a way that, yes, they might have a higher
11 numerical bid, but the underlying result of that would be no
12 regulatory approval.

13 THE COURT: But why is that a problem? I mean,
14 because if they came in and said, we're going to increase
15 our bid to 100,000 -- \$100 million, then wouldn't the debtor
16 have a sound business basis for rejecting the bid?

17 THE WITNESS: The regulators would not approve the
18 transaction and we would end up with nothing.

19 THE COURT: But that's why -- I don't understand
20 why you wouldn't ask. That's the point I don't -- the
21 question I don't understand. If they were doomed to failure
22 how could you conclude that without hearing from them first?
23 That's what I don't understand.

24 THE WITNESS: Well, we did ask for pro forma
25 ballot sheets to confirm their ratios. We said, okay, where

1 are you. You know, we were trying to measure where they
2 were. I mean, we didn't know how -- you know, we didn't
3 anticipate that the bidding would get so lofty. And then
4 when it did, periodically we pulled out our models and said,
5 okay. So if everybody -- if they have \$100 million and
6 they're going to pay us X dollars, what are the ratios and
7 what do we think the regulator is going to say about that.

8 THE COURT: But the point of the cross-examination
9 was you never disclosed any of that to RKJS, right?

10 THE WITNESS: We had conversations with them, but
11 we never said, hey, your bid is not going to be -- you know,
12 if you come within a certain dollar amount we never said to
13 them, you're not going to be chosen. It's -- you know, the
14 -- in the definitive agreement or in the auction procedures
15 it says highest or best, and we were really looking for
16 best. And I think people are hanging on highest a little
17 bit, but we did have a lot of discussion about making sure
18 that we gave them the opportunity to present financials to
19 us and to make their case as to why they have a stable bid.
20 And we didn't want to end up in a situation where RKJS was
21 the highest bid, but a non-approvable bid and then we would
22 lose Nat Penn at the same time.

23 THE COURT: But that's -- you're saying that's the
24 situation you're in now. That's what you want the Court to
25 believe, isn't it?

1 THE WITNESS: I'm just -- I think the discussion
2 that we're having here today is about what took place at the
3 auction. Now I guess there's still an open item of what you
4 do now since there's been a new bid. I mean, I kind of feel
5 like people are criticizing the auction process and I --

6 THE COURT: No. No. No. You don't understand.
7 Forget the new bid for a moment.

8 THE WITNESS: Okay.

9 THE COURT: You're criticizing the bid for being
10 what it was. I don't understand. Why you could -- what was
11 the problem with ask -- telling them that they needed to do
12 something to strengthen their bid to address this issue? If
13 it was so clearly going to fail because of regulatory
14 approval, why not see what else they would do?

15 THE WITNESS: We did. We said give us financials
16 and give us more information to show us that you can do
17 better. We requested financials more than once throughout
18 the day.

19 THE COURT: Were you involved in the decision to
20 conclude the auction -- I'm not finding that this is the way
21 it happened, but RKJS would say sort of in a perfunctory
22 hasty way and that all the other parties simply, you know,
23 packed up and left?

24 THE WITNESS: I was not involved in that decision.
25 No.

1 THE COURT: Do you know why that was decided to be
2 done?

3 THE WITNESS: I don't. I was not involved in that
4 discussion.

5 THE COURT: Okay. Do either or any of the parties
6 have any questions of the witness in light of the Court's
7 questions?

8 MR. O'NEILL: I do not, Your Honor.

9 MS. SPRINGER: Your Honor, just one question.

10 CROSS EXAMINATION

11 BY MS. SPRINGER:

12 Q Mr. Boyan.

13 A Hi.

14 Q I just want to clarify. At any time during the
15 proceeding did you --

16 A By proceeding you mean the auction, right?

17 Q The auction.

18 A Okay.

19 Q Exactly. Or after Nat Penn became involved as a bidder
20 did you or your firm represent National Penn Bank in this
21 transaction?

22 A No.

23 Q Okay. As far as you know was National Penn represented
24 by another investment banking firm?

25 A They were represented by Jefferies which is an

1 investment banking firm.

2 Q And in connection with your representation of the
3 debtor, did you have conversations with Jefferies as
4 representative of National Penn Bank?

5 A Yes. We talked quite extensively with Jefferies.

6 Q And did Jefferies negotiate on behalf of National Penn
7 Bank?

8 A They did and one of the early touch points was that the
9 creditors' committee wanted to have Nat Penn receive access
10 to the data room, due diligence materials ahead of the
11 hearing that we had on whatever that day was that we were
12 here last, and we said, no, we cannot do that. We're not
13 going to get ahead of the judge. And we continued to come
14 under pressure from the creditors' committee, so we thought
15 it out and said, okay. Well, this would help -- you know,
16 one of the criticisms is there wasn't enough time. So we
17 let Nat Penn in and let them get started ahead of the
18 hearing that we had.

19 Q And do you feel that the auction process in your mind
20 was -- do you feel that both bidders were treated in a fair
21 manner?

22 A Yes, I do. And I think each party was given nine to
23 ten shots to make their case, and we listened, recorded
24 everything, let people know exactly where they stood in the
25 auction process as it related to the numeric's. And I felt

1 like each side had their opportunity to speak their mind and
2 make their bids.

3 Q Okay. Thank you.

4 MS. SPRINGER: No further questions.

5 THE WITNESS: Thank you.

6 RECROSS-EXAMINATION

7 BY MR. MELLOTT:

8 Q Mr. Boyan, is it your testimony that Sandler O'Neill
9 has no hope to continue to represent Nat Penn in the future?

10 A They're not a client of mine typically, so it's not
11 something that I considered.

12 Q But the closing on that deal in which Nat Penn was the
13 financial advisor was in January of 2014, wasn't it?

14 A I wouldn't call it a deal. It was a stock repurchase
15 which is a very small transaction and, frankly, I wouldn't
16 call it a transaction.

17 Q But that was January of 2014?

18 A I believe so. I just took that from your statement.

19 Q Well --

20 (Pause)

21 MR. MELLOTT: May I approach, Your Honor, with an
22 exhibit?

23 THE COURT: Yes.

24 MR. MELLOTT: I would like to have that marked as
25 the next exhibit.

1 THE COURT: 13.

2 MR. MELLOTT: Thank you, Your Honor. Exhibit 13.

3 BY MR. MELLOTT:

4 Q I'll show you, Mr. Boyan, what's been marked as RKJS
5 Exhibit 13 and ask you if that's a Sandler O'Neill press
6 release dated January 28, 2014 announcing the stock
7 repurchase that we've been discussing?

8 A Yes.

9 Q Okay.

10 MR. MELLOTT: I would move that into evidence,
11 Your Honor.

12 MR. O'NEILL: No objection, Your Honor.

13 THE COURT: RKJS 13 is admitted.

14 (RKJS Exhibit No. 13 received)

15 BY MR. MELLOTT:

16 Q I would like you to go back to Debtor Exhibit 1, the
17 spreadsheet that His Honor was asking you about.

18 Now as I understand it you had asked for a specific bid
19 from Nat Penn in response to the tenth bid shown in that
20 sheet, thirteen-million-two from RKJS, correct?

21 A Can you repeat the question, please?

22 Q You had stated to Nat Penn what their bid would have to
23 be to qualify to outbid the tenth bid from RKJS, correct?

24 A Correct.

25 Q And if they had given you that bid, you then would have

1 asked for -- calculated the next bid for RKJS, correct?

2 A Yes. Actually, this spreadsheet initially went to nine
3 rounds and as the bidding went on we added ten, eleven,
4 twelve, thirteen, fourteen, and those did not materialize so
5 we deleted the columns that were not necessary.

6 Q And it was your intent to proceed until one of the
7 bidders stopped?

8 A That's correct.

9 Q Even though by the end of the bid from RKJS in the
10 tenth round you then made the determination that whatever
11 bid Nat Penn had that was lower was going to qualify and be
12 the better bid and you were willing to let that keep
13 increasing for Nat Penn regardless of your conclusion
14 already that you were at a regulatory risk for RKJS that is
15 making that bid not worth more than the previous bid from
16 Nat Penn, correct?

17 A The conclusion was not made until after we talked with
18 the directors after the tenth bid -- after RKJS bid in the
19 tenth round.

20 Q So is it your testimony that the bid that RKJS gave as
21 its ninth bid, that previous bid from RKJS, if no response
22 had been given from Nat Penn, that that would have been a
23 qualified highest bid?

24 A We would have evaluated that at that point in time.

25 Q And if your evaluation was done the same way, then the

1 effect of having not made that evaluation until the tenth
2 bid by Nat Penn -- I mean, from RKJS with no response from
3 Nat Penn was just to get another bump from Nat Penn,
4 correct?

5 A I think the -- if Nat Penn had shown up to bid in the
6 tenth round we would have accepted that bid as the highest
7 bid and we would have put it back to RKJS for another bid.

8 Q The request for pro formas from RKJS that you referred
9 to earlier, those were made and provided to you at the day
10 of the auction, correct?

11 A We requested the information and the response we got
12 from your firm was we will only provide that information if
13 we're deemed to be the winning bidder. So there was no
14 disclosure of information at that point in time.

15 Q So it's your testimony that that information was not
16 provided to you during the break after the last bid before
17 Mr. Brody's announcement. Is that your testimony?

18 A My testimony is that we asked for it earlier in the
19 day. I cannot remember between which rounds. But it became
20 something that we were focused on. We pulled everyone into
21 the room. There were probably 15 people standing around,
22 most of whom were representing RKJS. We had extensive
23 conversation about our concerns. We asked for financials.
24 We asked for a list of all those who were involved as
25 participants in the group. And we were told by, I believe

1 it was Mr. Schiffer that we would only receive that
2 information at the conclusion of the bidding.

3 Q So it's your testimony you did not receive that
4 information?

5 A You're asking me a question that is -- actually, the
6 question was asked twice. So the first time we did not
7 receive it. The second time it was requested. I did not
8 see -- I did not see it at the end of the day, at the
9 conclusion of bidding.

10 Q So it's your testimony the debtor did not receive that
11 information?

12 A I didn't say that. I did not see it at the conclusion
13 of the bidding.

14 Q Before Mr. Brody announced that Nat Penn had been
15 selected as the best -- for approval of the board, was there
16 any indication from the time that the last RKJS bid was
17 given until that announcement, any indication given by you
18 or anyone that you knew of on the debtors' side to RKJS that
19 the decision had been made to announce that Nat Penn would
20 be the highest bid -- would be the best bid?

21 A No.

22 MR. MELLOTT: Nothing further. Thank you, Your
23 Honor.

24 THE COURT: Mr. Boyan, could you look at debtor --
25 I'm sorry -- RKJS Exhibit 11 again at page -- if you look at

1 the top there's a legend that says document number, and if
2 you keep going it comes to Document Number 43-1, page 1 of
3 9.

4 THE WITNESS: Excuse me. You said 11?

5 THE COURT: Correct. It's RKJ -- it's in the RKJS
6 binder behind Tab 11, at least in my book.

7 THE WITNESS: Yeah. I -- okay. I have one of 15.

8 THE COURT: Okay. That's the beginning and then
9 you keep going.

10 THE WITNESS: Oh, okay. Okay. Got it.

11 THE COURT: You see a verified statement?

12 THE WITNESS: Yeah.

13 THE COURT: And that says that you were the person
14 who signed this statement, right?

15 THE WITNESS: Yes.

16 THE COURT: How was this verified statement
17 prepared?

18 THE WITNESS: The lawyers prepared it. Initially,
19 I read through it, looked at it and approved it.

20 THE COURT: Did you do any independent checking of
21 any kind of conflict system or client representation system?

22 THE WITNESS: We did. We have an internal group
23 that took care of all of that for us. We have a compliance
24 department that heralded that.

25 THE COURT: And you physically signed an affidavit

1 like this, blue ink on white paper?

2 THE WITNESS: I believe -- yes.

3 THE COURT: And you executed it on February 13th?

4 THE WITNESS: Yes.

5 THE COURT: At -- how does that -- I'm confused.

6 How does that relate in time -- it's after this stock
7 offering transaction or deal that you discussed. I
8 understand that. But there was testimony about National
9 Penn arriving at the offices of First Mariner for the sit
10 down with management. I'm confused about when that meeting
11 took place. This is when they sort of came back to be
12 interested.

13 THE WITNESS: What was the date of our hearing
14 last? It was Friday, March 7th, I believe.

15 THE COURT: I think that's right. The order
16 appears to have been entered on March 8th.

17 THE WITNESS: So it would have been that
18 Wednesday, the 5th.

19 THE COURT: So sometime in March after you --

20 THE WITNESS: Correct.

21 THE COURT: -- signed your affidavit. And have
22 you gone back to reconsider anything that you've said in
23 this affidavit in light of subsequent developments?

24 THE WITNESS: Clearly, we should have maybe let
25 people know that we have represented Nat Penn in the past,

1 but, you know, I really don't see it as a conflict today and
2 apparently did not at the time I signed the affidavit.

3 THE COURT: I see. All right. I have no further
4 questions.

5 Any more questions of this witness in light of
6 that inquiry?

7 MR. MELLOTT: No, Your Honor.

8 MR. O'NEILL: No, Your Honor.

9 THE COURT: All right. Thank you for your
10 testimony, sir. You may step down.

11 THE WITNESS: Thank you.

12 THE COURT: Is there some other witness the debtor
13 wishes to call today?

14 MR. O'NEILL: Yes, Your Honor. The Debtor calls
15 Mark Keidel.

16 THE COURT: All right, sir. If you would come
17 forward. Would you please stand and raise your right hand
18 in front of the witness box and be sworn in before taking a
19 seat.

20 MARK KEIDEL, WITNESS, SWORN

21 THE CLERK: Please be seated.

22 Please state your full name and address for the
23 record.

24 THE WITNESS: It's Mark Alan Keidel. My address
25 is 6313 Arlington Lane, Woodvine, Maryland, zip code is

1 21797.

2 THE CLERK: Thank you.

3 DIRECT EXAMINATION

4 BY MR. O'NEILL:

5 Q Mr. Keidel, where do you work?

6 A First Mariner Bancorp and First Mariner Bank.

7 Q What is your position at those two institutions?

8 A Currently the interim CEO.

9 Q Okay. Are you also a member of the board of directors?

10 A Yes, I am.

11 Q For how long have you been a member of the board of
12 directors?

13 A Since 2009.

14 Q And how long have you worked in the banking industry?

15 A Just over 30 years.

16 Q And are you generally familiar with the marketing and
17 sale of First Mariner Bank, what's the subject of this
18 proceeding?

19 A Yes, I am.

20 Q Formerly speaking, what involvement did you have in the
21 prepetition efforts to market the bank and the selection of
22 RKJS as the stalking horse?

23 A I believe it was in November. We were approached by
24 the RKJS group, negotiated a term sheet, assisted with some
25 diligence in their efforts, certainly guided other bank

1 management in diligence and their efforts, was involved to
2 some degree with negotiations of some of the other
3 documents, the bankruptcy documents.

4 Q And what involvement did you have in the post-petition
5 efforts to market the bank?

6 A Primarily, the interaction with Nat Penn. They did
7 come forward shortly after the hearing, if not before the
8 hearing on March 7th, to my recollection. So we spent an
9 extensive amount of time with Nat Penn, both answering their
10 questions and satisfying their diligence needs as well as
11 visiting Nat Penn and satisfying our needs in terms of our
12 diligence.

13 Q What -- were you involved in the auction that occurred
14 last Thursday?

15 A Yes, I was.

16 Q And what was your role in all of that?

17 A I was, you know, representing the company as an
18 executive officer and a board member. However, the board
19 directed Barry Bondruff to be the chairman of the special
20 committee. I was not a member of the special committee.

21 Q You mentioned the special committee. How was the
22 special committee formed?

23 A It was a sub-committee formed that the board approved
24 selected by the chairman of the board, Mike Watson. Mike
25 wanted to be certain that the committee included both

1 creditors because there are some board members who are
2 creditors and some who are not. So I believe we had two
3 board members who were not creditors on that committee.

4 Q And what was the purpose of the special committee?

5 A To, you know, certainly hear input from the advisors in
6 terms of the auction and to provide approval of a
7 preliminary or a provisional bidder to --

8 Q And --

9 A -- to recommend to the full board.

10 Q Well, you mentioned Mr. Bondruff. It was -- he was
11 never on the special committee and the board?

12 A That's correct.

13 Q And what role, if any, did he have at the auction?

14 A He was there throughout all the bidding, was certainly
15 involved in various conversations, some of the deliberations
16 of the professionals, and he was there for the full duration
17 of the auction.

18 Q The last time you were here you testified about the
19 auction procedures; is that right?

20 A Correct.

21 Q And those procedures approved a stalking horse bidder,
22 isn't that right?

23 A That's correct.

24 Q And who was that?

25 A RKJS.

1 Q And to what extend did the auction procedures establish
2 a deadline for the submission of competing bids?

3 A I believe it was April 7th.

4 Q And what, if any, competing bids were received by that
5 deadline?

6 A We did receive a bid from National Penn Bank, National
7 Penn Bank shares.

8 Q And what is National Penn?

9 A National Penn is about a \$9 billion bank holding
10 company headquartered in Allentown, Pennsylvania,
11 approximately a billion dollars in capital and a billion-
12 five in market cap.

13 Q To what extent are you familiar with Nat Penn?

14 A Certainly, back in the fall when we had some
15 preliminary discussions, reviewed their financials, learned
16 a little bit more about them at some of the management.
17 After they reemerged in the process, certainly did a little
18 more work, read their public filings, their most recent
19 public filings, spent an entire day in Allentown reviewing
20 the most recent financials, reviewing both their current
21 capital ratios as well as expected capital ratios post-
22 transaction, reviewed the status of their regulatory
23 situation, saw presentations regarding the regulatory
24 situation that were provided to them by their regulators.
25 Our counsel also reviewed regulatory filings when we were

1 there.

2 Q And all of those activities that you were just
3 describing, when did they occur in relation to the auction
4 or this -- the auction process?

5 A Our process was conducted on April 1st.

6 Q So following the initial -- the initiation of the
7 marketing process, but before the submission of the
8 competing bids?

9 A Yes.

10 Q What are the -- well, strike that.

11 You -- to what extent -- or what involvement did you
12 have in the determination of whether competing bids were
13 qualified?

14 A Certainly, when we received the bid we forwarded the
15 bid, and I do believe most of the counsel was copied on the
16 bid. But we wanted to make sure and confirm that everybody
17 had received it. We asked a variety of experts to review
18 the bid. I know there were conversations between our
19 advisors and Nat Penn to clarify any points where we were
20 concerned that maybe it needed to be changed to be
21 qualified. I believe those changes were made.

22 Our internal counsel, board counsel, regulatory
23 counsel, bankruptcy counsel, and Sandler O'Neill, I believe,
24 all participated in staying the bid to confirm that it was
25 qualifying and then also reviewed certain items that were

1 challenged by the RKJS counsel, spent an extensive amount of
2 time with the experts there. It's a very legal process, so
3 I clearly relied on lawyers to instruct me and direct me in
4 terms of what I was looking at, received a summary from
5 Kilpatrick Townsend that kind of put forth the case that the
6 bid was qualified. And I do believe we forwarded the
7 objections to the board and informed the board that based on
8 our review a qualified bid had been received.

9 Q Okay. And just -- I think you brought this up, but I
10 want to make sure it's clear. From whom did you get the
11 authority to determine whether the bid was qualified?

12 A The board.

13 Q So the board delegated determination of whether the bid
14 was qualified to you; is that --

15 A Correct.

16 Q To what extent did the debtor consult with the
17 creditors' committee before determining whether the Nat Penn
18 bid was a qualified bid?

19 A My understanding was that there were conversations
20 between the professionals and the advisors.

21 Q And what was the outcome of those conversations?

22 A Their conclusion also was that the National Penn bid
23 was a qualified bid.

24 Q Did there come a time when the debtor held an auction
25 for the stock of the bank?

1 A Yes.

2 Q When was -- when and where was that?

3 A I believe it was last Thursday.

4 Q Here in Baltimore?

5 A Correct.

6 Q Did you attend that auction?

7 A I did.

8 Q How long did it last?

9 A Well, I think there were some procedural things that
10 started around 10:00. I believe the actual auction started
11 around noon or a little after.

12 Q And how -- you attended for the full duration of the
13 auction?

14 A I did.

15 Q And how long was Mr. Bondruff present at the auction?

16 A Full duration.

17 Q You mentioned the special sub-committee of the board.
18 How, if at all, was it kept abreast of proceedings at the
19 auction?

20 A You know, we had had this committee on standby. Of
21 course, nobody knew how long this would work. So I
22 regularly emailed either my administrative assistant or the
23 chairman just to let them know that, you know, we were
24 working through the process, couldn't give them an estimate
25 as to when we may have a call. I didn't want to put

1 anything in electronic form that, you know, conveyed where
2 the bidding was per se. I wanted to be careful about
3 confidentiality. And that was it. So we were really just
4 trying to keep them around and let them know when a call for
5 a final determination and more deliberation might be needed.

6 Q Okay. And which of the debtors' professionals attended
7 the auction?

8 A Sandler O'Neill, Kilpatrick Townsend, bankruptcy
9 counsel, the board's counsel, and the company's general
10 counsel.

11 Q To what extent did the committee or its representatives
12 attend the auction?

13 A The committee members?

14 Q Yes. The creditors' committee.

15 A The creditors' committee. They were represented by
16 their financial advisor, Karl Marx, as well as Kirkland
17 Ellis, their legal counsel.

18 Q How many rounds of bidding were there at the auction?

19 A I believe there were ten.

20 Q How did the bidding conclude?

21 A The bidding concluded, I believe the RKJS group made a
22 bid and subsequent to that, I can't remember whether there
23 was a break or not, and the Nat Penn group elected not to
24 continue or increase their bid.

25 Q And what, if anything, did the debtor do after Nat Penn

1 passed to evaluate the two final bids at the auction?

2 A Well, there was a great deal of discussion amongst
3 individuals, amongst professionals, consultation with the
4 committee. I believe the duration was in the several hour
5 range that we debated the -- basically the two bids that
6 were left at the end.

7 Q And was Mr. Bondruff involved in those discussions?

8 A Yes, very much.

9 Q And was the special committee involved in those
10 discussions?

11 A The special committee was informed and we did have a --
12 I can't remember the length of the call, but we had a fairly
13 lengthy call updating them on the proceedings, advising them
14 what all the different advisors thought, shared with them
15 the views of the creditors' committee and the like.

16 Q And the debtors' advisors participated in those
17 discussions as well?

18 A Yes.

19 Q And what, if any, conclusion resulted from those
20 discussions?

21 A Well, I think we did recognize that from a financial
22 standpoint the bids were very close, and by the way we
23 measured it the RKJS bid was the higher bid. We then had to
24 move to was it the best bid or I think otherwise best bid.
25 I never thought I would recognize that term as much as I do,

1 but I do now. And so there was a lot of discussion, you
2 know, more on qualitative factors. You know, we certainly
3 expected and knew that those types of discussions were part
4 of this.

5 And as was testified to before, I think it came to the
6 point where the RKJS bid became higher than we would have
7 expected and we began to get concerned about the
8 reallocation of dollars to the estate and away from the
9 bank, and what implications that may have on regulatory
10 approval.

11 And also just in the nature of a club transaction,
12 there are a lot of other investors who are there, you know,
13 we really weren't sure of who had authority in terms of
14 those other investors if the deal terms changed
15 significantly, whether there was a break point or not.

16 So those types of concerns started to come in. The
17 advisors were unanimous. Every advisor that advised the
18 board as well as the credit -- creditors' committee voiced a
19 pretty strong recommendation for the Nat Penn bid, you know,
20 just given the certainty to close. No one was saying that
21 RKJS would not get regulatory approval. I think there was a
22 level of confidence there. But I think given the changes in
23 the transaction, the length of time that that might take, if
24 there needed to be more capital put in or the business plan
25 needed to change, that might have a material impact on the

1 length of time that it would take to get regulatory
2 approval. And our experience and since I've been CEO is
3 time has not been our friend in terms of the financial
4 health of the company.

5 Q Okay. How, if at all, did the structure of the RKJS
6 proposal as a club deal affect your appraisal of the
7 likelihood of regulatory approval?

8 A Well, certainly when you have multiple investors and if
9 there are material changes, you know, you do get concerned
10 that do all have to approve, do some. If there's changes in
11 the capital structure, you know, what requirements are
12 needed. You know, generally, if one of the larger investors
13 would pull out, it collapses the capital deck, if you will.
14 And it becomes a very -- you know, a challenging situation.
15 So there's just more moving pieces with a club deal.

16 Q And how, if at all, would changes in the percentage
17 interests of members of the club affect your appraisal of
18 the likelihood of regulatory approval?

19 A Well, you know, I'm not an expert there and I don't
20 think we -- I don't think we tried to characterize that.
21 But I think you do get concerned if more preferred equity is
22 put into a transaction, you know, that you can dilute other
23 investors. So there were those kinds of uncertainties.

24 (Pause)

25 Q To what extent, if any, did counterparty risk factor

1 into your appraisal of which bid was higher or which bidder
2 -- which bid was best?

3 A Well --

4 MR. MELLOTT: Your Honor, I'm not sure there's
5 been any testimony about counterparty risk.

6 MR. O'NEILL: I said --

7 THE COURT: Yes.

8 MR. O'NEILL: I said to what extent, if any. I
9 mean, that's a foundational objection. So --

10 THE COURT: Overruled. You can ask the question.

11 THE WITNESS: It's an element of a variety of
12 factors. You have to consider it.

13 BY MR. O'NEILL:

14 Q And how would you consider it?

15 A Well, again, the risk of a counterparty certainly to
16 close either collectively or individually, you would
17 evaluate, you know, the prospects and what can go wrong.

18 Q What, if any -- what was your appraisal of the
19 counterparty risk of the RKJS?

20 A Well, again, I don't think there was, you know, a
21 negative view of the RKJS bid in terms of the probability to
22 close or the -- not the probability to close, but the
23 regulatory approval. But there was concern that given the
24 changes that it could delay the approval, more time could go
25 by. It might allow for investors in the group to become

1 concerned if the company continued to lose money, the
2 regulatory process drug on. You know, it's -- it becomes a
3 less attractive investment and with multiple investors,
4 again, it only takes one for that process to start to
5 unwind. We experienced that in the beginning of the
6 transaction. When one investor pulled out it took a
7 considerable amount of time to backfill another investor.

8 I had had a conversation with our regulators and
9 we asked the question just prior to the auction, you know,
10 what would happen if there was a material change in the
11 transaction and one of the regulators -- there wasn't a
12 general discouragement, but one of the regulators said it
13 wouldn't be helpful.

14 Q Okay. Now did there come a time after the auction when
15 RKJS sought to increase the amount of its bid?

16 A Yes.

17 Q And when was that?

18 A I believe the day or -- yeah, the day following.

19 Q And what did RKJS propose at that time?

20 A My recollection was that it was an increase of a
21 million dollars and I think they kept the rest of the terms
22 the same.

23 Q And what, if anything, did you do after you received
24 that proposal?

25 A I certainly looked at that in conjunction, talked about

1 that with the professionals first, spoke a little bit more
2 about it with both our chairman and Barry Bondruff who was
3 chairman of the special committee, again, waited to hear the
4 input from the creditors' committee. So we had all of that
5 input prior to the full board approval that took place on
6 Friday afternoon.

7 Q And what, if anything, did you conclude about the
8 increase in the RKJS bid as a result of this --

9 A Well, again, you know, I think you were back to some of
10 the same points that were raised earlier and it's hard to
11 say where there's a tipping point, but we felt like we were
12 at a tipping point where increasing the bid, you know, in
13 some ways almost put more risk in it. Again, I do believe
14 -- my recollection was within that offer was a commitment to
15 increase the capital. So I think, you know, that's helpful.
16 But, again, to diligence that to make sure there weren't
17 things in the other agreements that the common stockholders
18 had that might have prevented preferred from coming in over
19 top of them and diluting it, we just didn't know and there
20 just wasn't time to diligence that.

21 Q And you said you shared the proposal with the
22 creditors' committee. To what extent did you share the
23 result -- your views about the revised proposal with the
24 creditors' committee?

25 A The conversations -- I didn't have direct conversations

1 with the creditors' committee. The feedback I got from our
2 professionals was they considered it and I believe there was
3 an email communication from creditors' committee counsel
4 that said it -- the increase and the amount would not change
5 their selection of Nat Penn as the best bid.

6 Q And to what extend did the debtor communicate with
7 regulators after the close of the auction concerning the
8 likelihood of RKJS receiving regulatory approval?

9 A I'm sorry. Can you repeat that?

10 Q To what extent did the debtor communicate with
11 regulators following the closure of the auction concerning
12 the likelihood of RKJS receiving regulatory approval?

13 A I don't recall that I had any conversations. I believe
14 counsel may have had some.

15 Q Do you recall how those communications came about?

16 A I --

17 MR. MELLOTT: Objection, Your Honor. Now we
18 really are into hearsay.

19 THE COURT: Overruled.

20 THE WITNESS: I'm sorry. Repeat the question.

21 THE COURT: The question was, do you recall how
22 those communications came about. I don't see how that's
23 hearsay. So you can answer that.

24 THE WITNESS: My recollection was I believe that
25 our regulatory counsel did have a conversation with certain

1 regulators.

2 BY MR. O'NEILL:

3 Q Do you have an understanding as to how that
4 communication came about?

5 A No, I do not.

6 Q Did there come a time when Nat Penn indicated that it
7 would enhance the final bid it submitted at the auction?

8 A My recollection is yes.

9 Q And when was that?

10 A I don't recall. It's been quite busy over the last
11 couple of days, but I believe it was in the last two days.

12 Q And what was the nature of that enhancement?

13 A My understanding is that they would agree to push the
14 time frame out for regulatory approval to June 30.

15 Q Meaning the drop dead for regulatory --

16 A Correct.

17 Q -- approval would be moved from May 31 to June 30?

18 A Correct.

19 Q And what impact would that change have on the purchase
20 price and adjustment feature of the bid?

21 A It -- well, I -- the -- any loss that would be incurred
22 during the month of June would be a reduction from the
23 purchase price. So if there were to be an operating loss,
24 that would be a reduction to the purchase price.

25 Q And what did you do to evaluate this enhancement?

1 A Again, we discussed it. There were clearly pros and
2 cons. You know, the extra time, you know, is helpful in
3 case there is any problem. We didn't expect one, but it was
4 helpful to have that insurance. And both the company and
5 the creditors' committee viewed the cost or the potential
6 cost of that insurance, if you will, which might be one
7 month's earnings to be a fair tradeoff and we accepted that.

8 Q Did there come a time when the full board of directors
9 of the debtor met to consider the Nat Penn bid and RKJS bid?

10 A Yes.

11 Q When was that?

12 A Friday afternoon.

13 Q And what information was -- Friday afternoon, April
14 11th; is that right?

15 A Correct.

16 Q The day after the auction?

17 A Correct.

18 Q What information was provided to the board at that
19 meeting concerning the auction and the bids?

20 A My recollection was the spreadsheet that was, I
21 believe, the first exhibit today as well as the bid that
22 came in after the auction were both provided to the board.

23 Q To what extent was the board informed at that meeting
24 about the changes that RKJS had proposed to its bid
25 following the close of the auction?

1 A It was discussed. I believe -- actually, somebody, I
2 believe, read it and then it was -- and it was also
3 distributed so there was full consideration of it.

4 Q Which of the debtors' financial and legal advisors
5 attended the April 11th bid meeting?

6 A Again, I believe internal counsel, Kirkland Ellis, the
7 board's counsel, Kramer Levin as well as representatives of
8 Sandler O'Neill.

9 Q What discussion was there amongst members of the board
10 concerning the auction and then final bids?

11 A You know, there was extensive discussion around the
12 bids themselves. You know, clearly they had different
13 elements. There were discounts taken. There were stock
14 components in the Nat Penn bid. So a fair amount of time
15 was spent by Bill going over the -- you know, the financial
16 aspects of the bid. We obviously moved towards some of the
17 qualitative factors and the risk of certainty to close. And
18 I can't remember the duration of the call. It was fairly
19 lengthy. You know, the board -- I believe every board
20 member spoke. My recollection is, you know, there were
21 questions surrounding the impact on employees, things of
22 that nature that were answered.

23 And, again, a lot of questions about would the
24 transaction from RKJS require additional capital, where
25 would that come from, you know, is -- could the money be

1 secured, those types of questions.

2 Q And what, if anything, did the debtors' advisors
3 recommend to the board?

4 A Again, much like the special committee, unanimous and
5 fairly firm advice to the board to accept the Nat Penn
6 proposal.

7 Q What, if any, conclusion did the board come to
8 concerning which bid was highest and best?

9 A Well, certainly the board recognized that, you know,
10 the way we measured the bid, the RKJS bid was the highest
11 bid. So it moved to otherwise best and the board,
12 considering all the factors and the advice of its advisors
13 as well as the creditors' committee used -- viewed the Nat
14 Penn bid as the best bid.

15 MR. O'NEILL: I have nothing else, Your Honor.

16 THE COURT: Cross-examination.

17 MR. MELLOTT: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. MELLOTT:

20 Q Good afternoon, Mr. Keidel. My name is Chris Mellott.
21 I represent RKJS Bank.

22 A How are you?

23 Q How are you, sir?

24 A Good.

25 Q I want to start, if you would, turn to the exhibit

1 notebook and I would like you to look at Exhibit 6. Do you
2 recognize this April 8th letter --

3 A Yes, I do.

4 Q -- from counsel for RKJS?

5 A Yes.

6 Q And you've reviewed this letter?

7 A Yes, I did.

8 Q And this is the document you described earlier in your
9 testimony as RKJS's positions taken with the debtor about
10 the status of Nat Penn's bid submitted on April 7th and
11 whether it qualified, correct?

12 A Correct.

13 Q Now let me direct your attention to Section 1 that's
14 talking about capitalization and recapitalization of the
15 bank. Do you see that section?

16 A Yes.

17 Q Did the debtor set a dollar value on Nat Penn's "well
18 capitalized" proposal in its merger and acquisition
19 agreement?

20 A I don't recall in the merger and acquisition agreement.
21 What I believe we reviewed here was in the context of the
22 merger and the pro forma financial since it was -- this was
23 going to be a merger of First Mariner Bank into National
24 Penn Bank, that First Mariner Bank would not exist that, you
25 know, we looked at it globally, does the -- is the

1 capitalization level sufficient and is it going to be a
2 detriment or a difficulty for Nat Penn getting regulatory
3 approval.

4 Q Now you are familiar with the auction procedures,
5 correct, Mr. Keidel?

6 A To some degree, yes.

7 Q And you recall the provision that's cited here, Section
8 6(c), that indicates that even if there's not an amount then
9 the recapitalization has to be to the same extent as the
10 equity contribution. Do you remember that language in the
11 auction procedure?

12 A Yes, I do.

13 Q So was there a dollar value placed on the Nat Penn
14 offer to, you know, we'll bring you into the fold and we'll
15 make you part of this Pennsylvania Bank? Was there a dollar
16 value set on that by you or the board?

17 A No. What we looked at was, you know, Nat Penn Bank
18 shows capital in the one-billion-dollar range and I believe
19 at the bank level close to 800 million. So in terms of
20 financial strength and capacity, there was no question in
21 our mind that Nat Penn was extraordinarily well positioned
22 from a capital standpoint to absorb the merger of the bank.

23 Q So for these branches that were coming in to be --
24 capitalizing this new entity being brought in to Nat Penn
25 you didn't put a value on that, did you?

1 A No. We looked at it collectively for, you know, would
2 it cause a capitalization problem and was the combined
3 entity capital sufficient because there was no dollars
4 coming into First Mariner, if you would. The structure of
5 the agreement was that First Mariner would be merged with
6 and into Nat Penn Bank.

7 Q Well, did you look at the tier one leverage and total
8 risk percentages that was going to result from this merged
9 entity?

10 A Yes.

11 Q And you concluded that that was in, what, the five
12 percent for the tier one leverage and the ten percent for
13 total risk, correct?

14 A My recollection is it was well in excess of that.

15 Q Was that -- was that documented? Does the board have
16 documentation as to what they assess the capitalization to
17 be?

18 A I received a document. I believe it was requested in
19 our diligence showing the pro forma capital ratios. I also
20 did my own independent calculations to see if the -- if the
21 calculations we were given seemed reasonable as did, I
22 believe, Mr. Boyan, who confirmed that he got to pretty much
23 the same numbers that Nat Penn provided.

24 Q But what the proposal is is to well capitalize and
25 that's a defined term, right?

1 A Yes. These numbers would be hundreds of millions of
2 dollars higher than the minimums needed for well
3 capitalized.

4 Q But that's not what's being proposed here. What was
5 proposed here was to be well capitalized. That's what's in
6 the merger and acquisition --

7 A Well, once you're beyond well capitalized you're well
8 capitalized. So there's no super well capitalized. There
9 -- once you're well capitalized, it's the matter of degrees
10 that you exceed that. And, again, these -- the level of
11 excess capital that Nat Penn would have had beyond the well
12 capitalized, the minimums required for well capitalized was
13 significant.

14 Q Did you discuss point two in this letter about -- at
15 your board meeting, and this is what -- we want to be clear.
16 You're on the board of the holding company, the debtor,
17 correct?

18 A That's correct and concurrently with the bank.

19 THE COURT: So when you say point two, Mr.
20 Mellott, where are you directing the witness?

21 MR. MELLOTT: On page 2 at the bottom, Numeral 2.

22 THE COURT: Okay.

23 MR. MELLOTT: I appreciate that. Thank you for
24 that clarification, Your Honor.

25 BY MR. MELLOTT:

1 Q In that section there's a discussion of this reverse
2 merger that's being proposed. Was there a discussion that
3 the board had about the additional aspect that that imposes
4 for regulatory approval?

5 A Our understanding of the reverse mortgage is -- or
6 reverse mortgage, flipping back into my banking mode --
7 reversed merger would be that, you know, it basically would
8 require OCC approval and OCC approval only that was the view
9 of our regulatory counsel. So actually only one regulator
10 would need to approve it.

11 Q So you did not -- did you evaluate the risk, though, of
12 that -- of the sanctions potential under that reverse
13 mortgage -- I mean, reverse --

14 A Ah, you actually said it.

15 Q I mean, reverse merger.

16 A In what sense?

17 Q Well, what discussions did you have about that? Did
18 you talk through the potential sanctions under these
19 sections --

20 A I did. I had general conversations and, certainly,
21 relied on counsel's view. You know, these are fairly
22 extensive provisions, regulatory provisions that while I'm
23 familiar with them, you know, certainly others within my
24 organization and advisors are even more familiar with. The
25 general sense of all these provisions when I received the

1 review and the written review from counsel was that these
2 conditions either in their mind didn't imply or didn't rise
3 to a threshold of materiality to disqualify the bid.

4 Q What about the aspect of the bid purchase price being
5 taken into account, the fact that it's got to cover the --
6 and this is the Nat Penn price -- has got to cover the one
7 million dollars that is the breakup fee and then the 1.75
8 million that's got to be reimbursed for expenses. Isn't
9 that going to reduce the price that's being bid?

10 A Yes, it would.

11 Q And then if the deposit that Nat Penn is providing is
12 required to be returned because they terminate, they don't
13 get approval, then you're in a position where the bank is
14 stuck with that 2.75 million.

15 A Well, my understanding is the deposit's made so the
16 2.75, I guess, would be paid and I think the view of this
17 was there would be a small amount that might be over and
18 above that that would hit the estate, but in the minds of
19 the advisors it wasn't material.

20 Q So if that deposit has to go back to Nat Penn, the
21 debtor's the one that's going to have to pay it out of the
22 estate or reduce what's available to the creditors, correct?

23 A Well, if the deposit went back our understanding was
24 that the deposit would go back. I thought the concern was
25 that if the 2.75 was paid and the remaining deposit went

1 back, it would be a slight hit to the estate. That was my
2 recollection of this discussion. And, again, that was the
3 view of our advisors.

4 MR. MELLOTT: I would move into evidence Exhibit
5 6.

6 MR. O'NEILL: No objection.

7 THE COURT: All right. Then RKJS Exhibit 6 is
8 admitted.

9 (RKJS Exhibit No. 6 received)

10 BY MR. MELLOTT:

11 Q Now Mr. Boyan testified that the bid process followed
12 through the ten bids. You verified there were ten bids.
13 Was there any point in time after that tenth bid from RKJS
14 in which the debtor indicated before the announcement on the
15 record that it was going to preliminarily conclude that the
16 best bid was Nat Penn's? Any discussion that you had or
17 anyone you know are for the debtor in which they told that
18 to RKJS?

19 A Not that I'm aware of.

20 Q And you never asked RKJS during that two-and-a-half-
21 hour period to consider increasing their bid because you
22 were now thinking about regulatory issues, correct?

23 A That's correct. I -- you know, my interactions with
24 either side were extraordinarily limited. I had a brief
25 conversation to clarify one of the rep and warranty issues

1 with representatives of Nat Penn. And I did not have any
2 interaction with the other group. You know, having not been
3 through one of these, you know, I wanted to let the
4 professionals and the advisors direct the types of
5 negotiations and the things that were instructed. But I
6 think that went both ways. I don't think there was any
7 communications with Nat Penn either in terms of, I guess
8 what I would look at as coaching.

9 So, you know, I think we all felt like regulatory
10 approval and certainly to close were issues that were so
11 obvious that, you know, I think none of us felt like they
12 needed to be put on the table. That was all of the
13 advisors.

14 Q Well, as a member of the board of the debtor were you
15 -- you were interested, correct, in obtaining the most
16 amount of money for the holding company as you could in this
17 bid process, right?

18 A I'm a creditor, so I was certainly aware of that. But
19 in my view bankers say sometimes your return of principal is
20 better than return on principal, and certainty of getting
21 the dollars became a more significant issue than a slightly
22 higher amount of dollars.

23 Q But the slightly higher amount was because you didn't
24 go back and talk to RKJS about the ability to increase their
25 bid, did you? So when you say slightly you're talking about

1 the 150,000, correct?

2 A Correct. And --

3 Q Okay. So the next thing that happens is everybody
4 leaves the auction, correct?

5 A Are you referring to after the closing of the auction?

6 Q I'm talking about Mr. Brody announces that the auction
7 is over and everything is going off the record. You were
8 gone. You didn't stand around and talk to anybody, correct?

9 A I went back to -- we were in a conference room. I went
10 back, got my information and, you know, left. I think a lot
11 of people left. Let's face it. It's a very contentious
12 situation. It's emotional. People were emotional. I think
13 most people, you know, felt like they needed some distance.

14 Q Let me ask you to turn to Exhibit 9, Mr. Keidel, and in
15 particular first turn to the first page. This is the notice
16 of -- this is the Exhibit A to the notice of selection of
17 successful bidder. This is the redline that was submitted
18 on Friday of the Nat Penn merger and acquisition agreement.
19 Do you see that?

20 A Yes, sir.

21 Q If you would turn to Section 9.01, which is on page, at
22 the top, 71 of 248.

23 (Pause)

24 A I'm sorry. 71?

25 Q 71.

1 A Ah, now I'm with you. Okay.

2 Q This is Section 9.01 that I want to direct your
3 attention to, Mr. Keidel, at the bottom of that page. This
4 talks about the termination of this agreement and there's an
5 initial provision that talks about closing having not
6 occurred on April 30, but then the potential for an
7 automatic extension to May 31, 2014. Are you familiar with
8 that provision?

9 A Yes.

10 Q Now is this the provision that you said has now been
11 modified to June 30?

12 A That was our discussions. Yes.

13 Q So has that been actually offered by Nat Penn and
14 accepted by the debtor?

15 A That's my understanding.

16 Q But this agreement that was filed on Friday doesn't
17 reflect that?

18 A Our -- correct. Our conversations took place much like
19 other conversations with the other bidder invariably
20 conversations, you know, to clarify things, bring out points
21 of weakness (sic) continue to happen. So we were having
22 conversations along those lines.

23 Q And was there any price adjustment associated with that
24 extension?

25 A Yes. My understanding is that the potential price

1 adjustment, not certain, but should there be operating
2 losses during the month of June, those losses would be
3 deducted from the purchase price.

4 Q So in other words, the adjustment is downward, correct?

5 A Potentially, but could be. Yes.

6 Q And has a new merger and acquisition agreement been
7 signed accepting that change?

8 A I don't believe so.

9 Q But the board's approved that?

10 A Conceptually, yes. We talked with the board I believe
11 actually this morning about that.

12 Q So from the perspective of the bank as the asset being
13 sold by the debtor, that process in which you're evaluating
14 these terms and adjusting a reduced price and the June 30
15 date is something that has now occurred post-April 10th,
16 correct?

17 A That's correct.

18 Q Mr. Keidel, has there been any discussion or
19 understanding that you have as to your position with Nat
20 Penn going forward?

21 A No.

22 Q None at all, huh?

23 A I've signed the same agreement or I will sign the same
24 agreement that I signed for the RKJS proposal.

25 Q And no discussions about anything other than that?

1 A A very high level of no assurances at all.

2 Q And when you say a very high level, what do you mean?

3 A Talk about different roles within Nat Penn,
4 particularly within the region and, you know, the regional
5 structure is different and somebody with my skill set
6 probably doesn't fit.

7 Q And who have you had those discussions with?

8 A Mr. Fainer (ph) and Mr. Hughes.

9 Q And when were those discussions?

10 A About a week ago.

11 Q So --

12 A Ten days ago.

13 Q This is Monday, the 14th. So --

14 A It was April 1st, actually.

15 Q So prior to the submission of the bid on April 7th?

16 A Yes. You know, we were all very aware, you know, that
17 the employment agreements and all, best -- you know, the
18 disturbance of those, they needed to remain in place.

19 Q And what positions do those individuals have at Nat
20 Penn?

21 A The two I mentioned?

22 Q Yes.

23 A Mr. Fainer is the CEO and Mr. Hughes is the CFO.

24 MR. MELLOTT: One second, Your Honor.

25 (Pause)

1 Q Did the -- those two gentlemen, the CEO and CFO, who I
2 believe were introduced, actually, as being here today, did
3 they attend the auction?

4 A Yes.

5 MR. MELLOTT: Nothing further, Your Honor. Thank
6 you.

7 THE COURT: Redirect.

8 REDIRECT EXAMINATION

9 BY MR. O'NEILL:

10 Q Just to clarify, Mr. Keidel, to the extent you have an
11 agreement with Nat Penn for a post-transaction employment,
12 that's identical to the agreement you have with RKJS, if
13 they're the prevailing bidder; is that right?

14 A That's correct.

15 Q And you said that in your high level discussions with
16 Mr. Fainer and his colleague, they informed you that you're
17 -- someone with your skill set probably didn't fit in the
18 organization?

19 A Well, no. I wouldn't say that.

20 THE COURT: That's not what he said, I don't
21 think.

22 THE WITNESS: No.

23 THE COURT: But you can continue on.

24 THE WITNESS: I said when I look at the situation
25 and typically in these -- in regional type structures, you

1 know, I'm a CFO by trade, which is typically more of an
2 administrative or corporate role. So, you know, the
3 likelihood of me staying is limited. There are limited
4 roles. I'm a Baltimore guy. I'm not relocating. And, you
5 know, we had that discussion. So, you know, there was
6 nothing beyond that. And, also, in my agreement I did agree
7 to waive change of control benefits that would -- could have
8 been triggered in this transaction the way it was
9 structured, and I agreed to waive those.

10 MR. O'NEILL: I have nothing else.

11 THE COURT: Mr. Keidel, when did you first learn
12 that the debtors' financial advisors had worked for National
13 Penn?

14 THE WITNESS: I guess I was looking at some press
15 releases because I think it was in my review probably in
16 early April. I did see the stock repurchase and I do -- I
17 think I saw that Sandler O'Neill represented Nat Penn in
18 that transaction.

19 THE COURT: And yet it wasn't called to anyone's
20 attention until today?

21 THE WITNESS: Not that I recall. You know,
22 Sandler O'Neill represents a lot of banks. So, you know,
23 from time to time they probably represented a vast -- a
24 substantial number of banks in the country. So I didn't
25 consider the fact that they represented Nat Penn in a

1 transaction unusual.

2 THE COURT: And what's your position with the
3 debtor?

4 THE WITNESS: I'm the CE -- interim CEO.

5 THE COURT: I see. Now I gather from your
6 testimony that there was concern about, I guess, both on the
7 ability to close and get regulatory approval front that
8 what's being proposed as RKJS is going to be financed
9 through a club deal I think was the terminology, right?

10 THE WITNESS: Correct.

11 THE COURT: Now there's no security deposit posted
12 by RKJS, right?

13 THE WITNESS: That's my recollection. Yes.

14 THE COURT: Was there ever any discussion about
15 addressing it -- the skin in the game if you will of RKJS by
16 requesting that they post a security deposit during any of
17 this process of the auction?

18 THE WITNESS: Not -- I believe there were a lot of
19 those discussions when the original merger agreement were --
20 was drafted, but there were none to my knowledge subsequent
21 to that because, again, there was an interim bank, but there
22 wasn't an entity at that time.

23 THE COURT: But if there -- the fragility of their
24 commitment was a big issue in the mind of the debtor and the
25 debtors' professional, why wasn't there some consideration

1 given to requesting that they address that by a security
2 deposit?

3 THE WITNESS: Well, again, you know, I'm looking
4 towards my advisors to help me with that. You know, it's an
5 auction process. The rules of that process are not well
6 known to me. And we didn't -- I didn't view the situation
7 to get into those negotiations. I allowed, you know, the
8 professionals to do those.

9 THE COURT: So saying it another way, it wasn't
10 considered and never proposed to RKJS?

11 THE WITNESS: Not to my knowledge.

12 THE COURT: And it wasn't offered. I think I
13 understood your testimony to be that after the auction --
14 the debtor contends that the auction concluded with the
15 announcement by Mr. Brody, that the debtor has purported to
16 enter into a new binding contract as yet undisclosed that
17 involves extension of the outside closing date to June 30th
18 with some downside adjustment in the purchase price. Did I
19 hear that correctly?

20 THE WITNESS: Yes.

21 THE COURT: And what do we have about the terms --
22 what do we know about the terms of that? Where has that
23 been disclosed before today?

24 THE WITNESS: Again, those have been discussions
25 to help alleviate any of the further concerns. They were

1 discussed somewhat, I believe, the night of the auction and
2 those discussions have continued to occur amongst the
3 professionals since.

4 THE COURT: All right. That answers my questions.

5 Do any of the parties have any questions of this
6 witness in light of the Court's questions?

7 UNIDENTIFIED SPEAKER: Your Honor, may I, but I
8 will defer to debtor because the --

9 THE COURT: Mr. O'Neill, we'll let you go first if
10 you have questions.

11 MR. O'NEILL: Thank you, Your Honor.

12 FURTHER REDIRECT EXAMINATION

13 BY MR. O'NEILL:

14 Q The judge asked you a couple of questions about
15 security deposits and whether the debtor had attempted to
16 obtain a security deposit from RKJS in connection with the
17 renegotiation of the stalking horse agreement and
18 thereafter. What leverage did the debtor have to obtain a
19 security deposit during the negotiation of the stalking
20 horse agreement?

21 A Well, you know, it's probably more limited in that
22 situation.

23 Q But did -- to what extent did the debtor seek such a
24 deposit?

25 A My recollection was that it was sought.

1 Q But it wasn't obtained?

2 A That is correct.

3 Q And has -- at any time following the auction has the
4 debtor sought a deposit?

5 A Repeat the question.

6 Q At any time since the conclusion of the auction has the
7 debtor sought a deposit from RKJS?

8 A It's been discussed. You know, I'm unaware of who
9 initiated the conversation, but I know it's been discussed.

10 Q But no agreement has been reached; is that right?

11 A That is correct.

12 MR. O'NEILL: Nothing else, Your Honor.

13 RECROSS-EXAMINATION

14 BY MR. MELLOTT:

15 Q Mr. Keidel, in connection with the questions you were
16 just asked about the deposit, there have -- it's your
17 testimony that there have been discussions about a deposit.
18 Are you referring to recent discussions about some type of
19 security deposit?

20 A Yes.

21 Q And following the bid that was provided by Nat Penn
22 that the debtor decided was qualified, you were back into a
23 bidding process with both bidders. Did you put anything on
24 the spreadsheet to indicate that there was going to be some
25 value to one of the parties putting forth a security deposit

1 that wasn't going to be refundable under certain
2 circumstances?

3 A No. We did not, but we didn't have any commitment or
4 any figures to decide upon. We did last minute.

5 Q And His Honor was asking you about considering those
6 types of things at the board meeting. You did have at the
7 board meeting the pro formas that had been provided by RKJS.
8 Did the board actually go through those pro formas?

9 A Pro formas for?

10 Q For how this was going to work with the funding from
11 the capitalization --

12 A I believe all we had was the capitalization table.

13 Q So it's your testimony that the board did not review
14 the pro formas from RKJS?

15 A The revised pro formas?

16 Q Yes. The revised.

17 A That's correct.

18 Q So when you met on April 11th you didn't review those?

19 A No, we did not. I -- to my knowledge we didn't have
20 them.

21 Q But you did review the capitalization tables?

22 A We did look at the capitalization tables. Yes.

23 Q Did you review the subscription agreements for the
24 investors?

25 A Counsel reviewed those.

1 Q But did the board actually address those and discuss
2 those at that board meeting?

3 A On the 11th I believe so. But they, you know, again,
4 recognized that there was a commitment, but, again, the
5 level of diligence we're not sure would need to be required
6 to assure that, you know, the funding was there and that
7 there weren't any conflicting issues with other agreements
8 of other investors.

9 Q Now, Mr. Keidel, you testified at this evaluation on
10 April 11th, the board -- I just want to be clear. The board
11 concluded as you had concluded the highest economic bid was
12 RKJS, correct?

13 A Yes. You know, there was clearly discussion that, you
14 know, even some amongst the creditors' committee given the
15 subjectivity of some of the factors in Nat Penn, you know,
16 it was -- it could have been considered that the other bid
17 was higher, but nobody was trying to recharacterize the
18 methodology that was used in the auction.

19 Q And the discussion about the deposits that you're
20 having with RKJS, that -- those were discussions today,
21 aren't they?

22 A Correct.

23 MR. MELLOTT: That's all. Thank you, Your Honor.

24 THE COURT: I have no further questions of the
25 witness. Thank you for your testimony, sir. You may step

1 down.

2 Any other evidence for the debtor?

3 MR. O'NEILL: No, Your Honor.

4 THE COURT: So the debtor rests?

5 MR. O'NEILL: Yes, Your Honor.

6 THE COURT: I see. All right.

7 Any other evidence going to be presented in
8 support of the proposed sale transaction?

9 MS. SPRINGER: Yes, Your Honor. Claudia Springer
10 for National Penn Bank. We will have a witness in support
11 of the sale transaction to National Penn Bank.

12 THE COURT: All right.

13 What about the committee?

14 MR. GETTLEMAN: Your Honor, the committee does not
15 intend to present any witnesses.

16 THE COURT: All right. We will resume tomorrow
17 morning at 10 a.m.

18 THE CLERK: All rise. This Court is adjourned.
19 (Whereupon, these proceedings concluded at 5:25 p.m.)

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CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: April 16, 2014

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